(5)

No. 88-42

In The

Supreme Court of the United States

October Term, 1988

OLAF A. HALLSTROM and
MARY E. HALLSTROM,

Petitioners,

v.

TILLAMOOK COUNTY,
a municipal corporation,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

JOINT APPENDIX

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Petition for Certiorari Filed July 6, 1988
Certiorari Granted March 20, 1989

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OLAF A. HALLSTROM, et al.	TILLAMOOK COUNTY

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1982		
APR 9	1)	COMPLT FOR VIOLATIONS OF SOLID WASTE DISPOSAL ACT, TRESPASS & NUISANCE – DEMAND FOR J/T
June 18	7)	ANS & demand for J/T
1983		
MAR 2	15)	Deft's Mot for s/j (oa req), affids
22	19)	Memo in opposition to motion for S/J
APR 1	20)	Reply to pltfs' memo in oopos to deft's mot for S/J
22	22)	ORD denying deft's mot for s/j (mot to dismiss) e/m 4-25 s/4-22-83 PA ntfd
JUN 8	())	PTO LODGED
1985		
SEP 30	120)	OPINION & ORD Deft ord to submit proposal outlining steps nesc to achieve perm & complete containment of leachate w/in boundaries of landfill site w/in 60 days entry of this ord. Claims for atty fees be addressed in supp submissions

by parties. This my finds of fact & conclusions of law per Rule 52(a) FRCP. e/m 10/1 s JU 9/30/85 ntfd

JUN 23 129) Final Judgment & decree 1) deft comply w/terms of ord & decree 6/23/86 & 2) deft have judgment in its favor on plt's claims for trespass, nuisance & inverse condemnation. e/m & s JU 6/23/86 ntfd

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Of Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

OLAF A. and MARY E. HALLSTROM, husband and wife, Plaintiffs, v. TILLAMOOK COUNTY, a municipal corporation, Defendant.	Civil No. 82-481 COMPLAINT FOR VIOLATIONS OF SOLID WASTE DISPOSAL ACT, TRESPASS, AND NUISANCE DEMAND FOR JURY TRIAL

Plaintiffs demand a jury trial and allege:

I

JURISDICTION AND VENUE

1. The jurisdiction of this court is predicated on 28 U.S.C. §1331 (federal question).

2. The first count arises out of violations of the Solid Waste Disposal Act, as amended, 42 U.S.C. §§6901-87. This court has jurisdiction of this claim pursuant to 42 U.S.C. §6972(a).

3. This court has jurisdiction of the second, third, and fourth counts because they arise out of facts that are substantially identical to the first count.

4. The amount in controversy exceeds $10,000 exclusive of interest and costs.

5. Venue is proper in this judicial district under 15 U.S.C. §1391(b) and under 42 U.S.C. §6972 because defendant resides here, the claim arose in this judicial district, and the violations of the Solid Waste Disposal Act occurred in this judicial district.

II

PARTIES

6. Plaintiffs are Oregon residents who own and live on farmland adjacent to an open dump owned and operated by defendant.

7. Defendant is an Oregon county and a municipal corporation duly incorporated and organized under Oregon law.

III

COUNT ONE

(Violation of Solid Waste Disposal Act)

8. Defendant owns and operates an illegal open dump, the Tillamook County Landfill, in Tillamook County, Oregon, in violation of the following statutes and regulations:

42 U.S.C. §6945
40 C.F.R. §§241.200-1, 241.202-1, 241.203-1, 241.204-1, 241-205-1, 241.207-1, 241.208-1, 241.209-1, and 241.210-1.
40 C.F.R. §§257.1, 257.3-1, 257.3-2, 257.3-3, 257.3-4, 257.3-6, and 257.3-7.
40 C.F.R. §§264.1-.77.
40 C.F.R. §§265.1-.94 and 265.220-.315.

9. The Tillamook County Landfill is being operated as an illegal open dump. Hazardous wastes have been disposed of on the site on a regular basis with little or no controls. Surface water and leachate discharged from the site onto plaintiffs' farmland and the groundwater under the site and plaintiffs' farmland are contaminated with dangerously high concentrations of hazardous wastes and dissolved solids. Emissions, including dust, from the site violate applicable air quality standards and adversely affect the quality of air around plaintiffs' residence and farmland. Conditions are maintained at the site that are favorable for the harboring, feeding, and breeding of vectors. The surface area of exposed solid waste has not been minimized, adequate and effective cover material has not been applied, and the solid waste has not been compacted. The site was improperly designed, and measures taken to direct the leachate produced at the site have not been effective. The leachate produced at the site has been allowed to drain onto plaintiffs' land, the tidewater areas adjacent to the site, and into Sutten Creek and the Tillamook River.

10. More than 60 days prior to the commencement of this action, plaintiffs served a notice of intent to file a citizen's suit pursuant to 42 U.S.C. §6972 and 40 C.F.R.

§254. Since service of the notice of intent to sue, contamination of groundwater has substantially increased and the leachate treatment system has failed.

11. Plaintiffs are entitled to injunctive relief requiring the immediate closure of the Tillamook County Landfill pursuant to 40 C.R.F. §§264.50-.56, 264.110-120, 265.50-.56, and 265.112-.118.

12. Plaintiffs are entitled to injunctive relief restraining defendant from operating the Tillamook County Landfill until it has been brought in compliance with the Solid Waste Disposal Act and regulations enacted thereunder.

13. As a result of defendant's conduct, plaintiffs' residence and farmland and the groundwater beneath have been contaminated with hazardous wastes and dissolved solids, and the value of plaintiffs' farmland has been reduced by more than $10,000, the exact amount to be determined at trial.

14. Under 42 U.S.C. 6972, plaintiffs are entitled to recover the costs of this litigation, including reasonable attorney and expert witness fees. A reasonable sum to award plaintiffs for their costs of the litigation is $35,000.00.

COUNT TWO

(Nuisance)

15. Plaintiffs reallege paragraphs 1 through 10 and 13, above.

16. Defendant's conduct has unreasonably interfered and continues to interfere with plaintiffs' use and enjoyment of their residence and farmland.

17. Plaintiffs have requested and given notice to defendant to control the continuing contamination of the surrounding land and water, but defendant has failed and refused to do so.

18. Plaintiffs are entitled to injunctive relief restraining defendant from operating the Tillamook County Landfill until it can be operated without unreasonable interference with plaintiffs' use and enjoyment of their residence and farmland.

19. Plaintiffs have been damaged by more than $10,000, the exact amount to be determined at trial, because of defendant's unreasonable interference with their use and enjoyment of their residence and farmland.

COUNT THREE

(Trespass)

20. Plaintiffs reallege paragraphs 1 through 10 and 13, above.

21. Defendant's conduct has caused and continues to cause leachate to be discharged upon plaintiffs' residence and farmland and to contaminate the groundwater beneath plaintiffs' residence and farmland without the consent and contrary to the desire of plaintiffs.

22. Such entry and contamination is inconsistent with plaintiffs' ownership of their farmland, and is in violation of plaintiffs' right to exclusive possession.

23. Plaintiffs are entitled to injunctive relief restraining defendant from operating the Tillamook County Landfill until it can be operated without trespass to plaintiffs' residence and farmland or the groundwater underneath.

COUNT FOUR

(Inverse Condemnation)

23. Plaintiffs reallege paragraphs 1 through 10, 16, 17, 21, and 22, above.

24. Defendant's conduct has substantially interfered and continues to substantially interfere with plaintiffs' use and enjoyment of their residence and farmland.

25. Defendant is authorized to exercise eminent domain, and it could have exercised eminent domain in pursuit of operating the Tillamook County Landfill.

26. Defendant's conduct constitutes a wrongful taking of plaintiffs' land for public use without compensation.

27. As a result of defendant's wrongful taking of plaintiffs' land, plaintiffs have been damaged by more than $10,000, the exact amount to be determined at trial.

28. Defendant's conduct was and continues to be willful and intentional. Exemplary damages should be assessed against defendant in the amount of $100,000.00 to deter defendant and others from similar conduct.

29. Under ORS 20.085, plaintiffs are entitled to recover reasonable attorney fees incurred in this case. A

reasonable sum to award plaintiffs for their attorney fees is $25,000.00.

WHEREFORE, PLAINTIFFS PRAY for the following relief against defendant:

1. An injunction requiring the immediate closure of the Tillamook County Landfill pursuant to 40 C.R.F. §§264.50-.56, 264.110-120, 265.50-.56, and 265.112-.118.

2. An injunction restraining defendant from operating the Tillamook County Landfill until it has been brought in compliance with the Solid Waste Disposal Act and regulations enacted thereunder.

3. An injunction restraining defendant from operating the Tillamook County Landfill until it can be operated without unreasonable interference with plaintiffs' use and enjoyment of their residence and farmland.

4. An injunction restraining defendant from operating the Tillamook County Landfill until it can be operated without trespass to plaintiffs' residence and farmland or the groundwater underneath.

5. Damages in an amount greater than $10,000 caused by defendant's unreasonable interference with plaintiffs' use and enjoyment of their residence and farmland.

6. Damages in an amount greater than $10,000 caused by defendant's trespass on and under plaintiffs' residence and farmland.

7. Damages in an amount greater than $10,000 caused by defendant's wrongful taking of plaintiffs' residence and farmland.

8. Exemplary damages in the amount of $100,000.

9. Plaintiffs' costs of this litigation, including $25,000 for reasonable attorney fees and $10,000 for expert witness fees.

10. Plaintiffs' costs and disbursements incurred in this case.

11. Such other relief as the court deems just and equitable.

DATED this 9 day of April, 1982.

Respectfully submitted,
ESLER & SCHNEIDER

By: /s/ Kim T. Buckley
Kim T. Buckley
Of Attorneys for Plaintiffs

(Certificate of Service omitted in printing)

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Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

OLAF A. and MARY E. HALLSTROM, husband and wife, Plaintiffs, v. TILLAMOOK COUNTY, a municipal corporation, Defendant.	Civil No. 82-481 ANSWER AND DEMAND FOR JURY TRIAL

Defendant alleges:

FIRST DEFENSE

1. Defendant admits that it is a municipal body duly organized and existing under Oregon law and that it operates a sanitary landfill in the vicinity of land owned by the Plaintiffs.

2. Except as specifically and expressly admitted above, Defendant denies each and every allegation, matter and thing contained in the Plaintiffs' Complaint and the whole thereof.

SECOND DEFENSE

This Court lacks jurisdiction of Plaintiffs' claims for the recovery of money damages for alleged violations of the Solid Waste Disposal Act (hereinafter referred to as "the Act"). The sole basis for this Court's jurisdiction of this controversy is the grant of jurisdiction at 42 USC § 6972(a). This grant of jurisdiction is limited to the enforcement of regulations or orders which have become effective pursuant to the Act.

THIRD DEFENSE

This Court lacks jurisdiction of Plaintiffs' pendant suits to enjoin Defendant. Defendant is immune from suits for injunctive relief by virtue of its sovereign immunity.

FOURTH DEFENSE

Plaintiffs have failed to commence this action within the time allowed by law.

FIFTH DEFENSE

Plaintiffs have failed to give Defendant notice of its claims as required by the Act and as required by Oregon law.

SIXTH DEFENSE

Plaintiffs have failed to state a claim upon which relief can be granted against this Defendant.

SEVENTH DEFENSE

Plaintiffs previously prosecuted an action against this Defendant in the Tillamook County Circuit Court in which the present claims were or could have been litigated to a final determination. Plaintiffs are therefore barred from maintaining the present action by the principal of *res judicata*.

EIGHTH DEFENSE

The matters of which Plaintiffs complain constitute the performance of or the failure to exercise or perform discretionary functions for which this Defendant is immune from liability under Oregon law.

NINTH DEFENSE

There is no basis under the Act for the recovery of punitive or exemplary damages, and Plaintiffs are barred by Oregon law from the recovery of punitive or exemplary damages from this Defendant.

TENTH DEFENSE

There are no standards or regulations for the operation of a landfill in effect in Oregon which have been authorized or approved pursuant to the Act. Defendant therefore cannot have committed any violation of the Act.

ELEVENTH DEFENSE

Under 42 USC § 6972, Defendant is entitled to

recover the cost of this litigation, including reasonable attorney fees and expert witness fees.

WHEREFORE, having fully answered Plaintiffs' Complaint, Defendant prays that Plaintiffs take nothing thereby, and for its costs, disbursements and attorney fees incurred herein.

DATED this 18th day of June, 1982.

BULLIVANT, WRIGHT, LEEDY, JOHNSON, PENDERGRASS & HOFFMAN

By (SIGNED) RONALD E. BAILEY
Ronald E. Bailey

By (SIGNED) JAMES G. DRISCOLL
James G. Driscoll

Attorneys for Defendant

(Certificate of Service omitted in printing)

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Of Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

OLAF A. and MARY HALLSTROM, husband and wife, Plaintiffs, v. TILLAMOOK COUNTY, a municipal corporation, Defendant.	Civil No. 82-481 MOTION FOR SUMMARY JUDGMENT (ORAL ARGUMENT REQUESTED)

Defendant moves the Court for summary judgment in its favor and against the plaintiffs on the grounds that there exists no genuine dispute as to any material fact and the defendant is entitled to judgment in its favor as a matter of law. Defendant further moves the Court for a judgment in its favor and against the plaintiffs for its reasonable attorneys' fees and other litigation costs incurred herein. Defendant requests oral argument.

This motion is based on the provisions of FRCP 56; the matters on file herein; the affidavits of Ernest A. Schmidt and James G. Driscoll, attached hereto as Exhibits A and B, respectively; and the following statement of points and authorities.

POINTS AND AUTHORITIES

I.

FACTS

Plaintiffs own and reside on property located adjacent to the site of the Tillamook County Sanitary landfill in Tillamook County, Oregon. In this action, the plaintiffs assert claims for violations of the Solid Waste Disposal Act (SWDA), 42 USC § 6901-6987 and pendent claims for common law trespass and nuisance and for inverse condemnation. The plaintiffs seek both damages and injunctive relief against Tillamook County arising out of the operation of the landfill. Plaintiffs allege jurisdiction in this Court based upon the "citizen suit" provisions of SWDA, 42 USC § 6972. Plaintiffs' common law and inverse condemnation claims are based on the Court's pendent jurisdiction.

The affidavits attached as Exhibits A and B establish that the plaintiffs have never given notice of the claimed violations of the Solid Waste Disposal Act to either the State of Oregon or to the Environmental Protection Agency.

II.

LAW

Subsection (a) of 42 USC § 6972 provides that:

> "Except as provided in Subsection (b) or (c) of this section, any person may commence a civil action on his own behalf –

> (1) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the Eleventh Amendment to the constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, or order which has become effective pursuant to this chapter;
>
> • • • •

"Any action under Paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred. . . ."

Subsection (b) of the statute provides:

"Actions prohibited. – No action may be commenced under Paragraph (a)(1) of this section –

> (1) prior to 60 days after the plaintiff has given notice of the violation (A) to the Administrator; (B) to the State in which the alleged violation occurs; and (C) to any alleged violator of such permit, standard, regulation, condition, requirement, or order; . . . "

The Environmental Protection Agency has supplemented the provisions of Subsection (b) of 42 USC § 6972 by promulgating specific requirements concerning where the requisite notice is to be sent, in what manner, and what information is to be contained in the notice. (40 CFR § 254.1-254.3)

This notice requirement has been expressly held to be a jurisdictional prerequisite to an action by a private citizen under 42 USC § 6972. In *McCastle v. Rollins Environmental Services*, 514 F Supp 936 (M.D. La., 1981) the court stated:

> "Section 6972 (c), as amended in 1978, provides, however, that no action may be commenced under the

Act until after plaintiff has given notice to the administrator of the Environmental Protection Agency. *Notice of this sort has been held to be jurisdictional and no action may be instituted in its absence.* See *National Sea Clammers Association v. City of New York*, 616 F2d 1222 (3rd Cir. 1980), cert. granted, 449 US 917, 101 S. Ct. 314, 66 L.Ed.2d 145 (1981), dealing with a similar notice provision under the Federal Water Polution Control Act.

"It is undisputed that plaintiffs have given no notice of this action and none is alleged in the petition. Under these circumstances, it is clear that plaintiffs have not brought and could not have brought this action under 42 USC § 6972 (a)." (514 F Supp at 939). (Emphasis added).

See also the decision in *Middlesex Cty. Sewerage Auth. v. Sea Clammers*, 453 US 1, 69 L.Ed.2d 435, 101 S.Ct. 2615 (1981), interpreting and applying the identical citizen suit provisions of the federal Water Pollution Control Act (FWPCA) and the nearly identical citizen suit provisions of the Marine Protection, Research and Sanctuaries Act of 1972 (MPRSA).

The District Court in the *Sea Clammers* Litigation had originally dismissed the action for failure of the plaintiffs to give the prior sixty-day notice of intent to sue required by those Acts. In describing the District Court decision, the Supreme Court stated:

" . . . With respect to the claims based on alleged violations of the FWPCA, the court noted that respondents had failed to comply with the 60-day notice requirement of the 'citizen suit' provision in §§ 505(b)(1)(A) of the Act, . . . This provision allows suits under the Act by private citizens, but authorizes only prospective relief, and the citizen plaintiffs first must give notice to the EPA, the State and any alleged violator." (453 US at 6).

The United States Court of Appeals for the Third Circuit upheld that portion of the District Court's decision, and no appeal was taken by any party to that portion of the opinion. However, the Court of Appeals went on to rule that the plaintiffs could maintain claims under FWPCA and MPRSA independent of the express citizen suit provisions and, also, under federal common law for public nuisance and under maritime tort law. (*National Sea Clammers Assn. v. City of New York, supra*). The United States Supreme Court granted certiorari to consider those portions of the Court of Appeals opinion.

The Supreme Court vacated the Court of Appeals decision, and ruled that Congress intended the express enforcement provisions of both Acts to be exclusive. Accordingly, the Supreme Court held the plaintiffs barred to maintain any suit or action under any legal theory or form of action except as expressly set forth in the Acts. Since the plaintiffs had failed to comply with the 60-day prior notice requirement and therefore could not maintain their action under the express statutory provisions, they were wholly barred from proceeding on those claims in federal court.

Applying the *Middlesex County* decision to the identical language in SWDA and the present circumstances, it is apparent that these plaintiffs are barred from proceeding further in this Court on these claims. The failure to comply with the 60-day prior notice requirement deprives the Court of jurisdiction under the citizen suit provisions of SWDA, and there is no other basis available to plaintiffs for federal jurisdiction.

III.

CONCLUSION

This Court's jurisdiction is based entirely on plaintiffs' claims for violations of the solid Waste Disposal Act. However, the provisions of that Act authorizing private suits by citizens expressly require the plaintiffs to give notice to both the Administrator of the EPA and the State of Oregon more than 60 days prior to commencing their lawsuit. No such notice has been given, and this Court therefore lacks jurisdiction of these claims.

IV.

ATTORNEYS' FEES AND COSTS

Subsection (e) of 42 USC § 6972 provides:

> "The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such an award is approproate."

In the event the Court grants defendant's Motion for Summary Judgment set forth immediately above, this defendant moves the court for its further Order awarding judgment in its favor and against the plaintiffs for its reasonable attorneys' fees and other costs incurred in defending this lawsuit.

Respectfully submitted this 1st day of March, 1983.

BULLIVANT, WRIGHT, LEEDY, JOHNSON,
PENDERGRASS & HOFFMAN

By_____

Ronald E. Bailey

By_____
James G. Driscoll

Attorneys for Defendant

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Of Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

OLAF A. and MARY HALLSTROM, husband and wife,	)	Civil No. 82-481
Plaintiffs,	)	AFFIDAVIT OF EARNEST A. SCHMIDT
v.	)	
TILLAMOOK COUNTY, a municipal corporation,	)	
Defendant.	)	

STATE OF OREGON)
) ss.
County of _____)

I, EARNEST A. SCHMIDT, being first duly sworn, do depose and say:

1. I am the administrator of the solid Waste Division of the Oregon Department of Environmental Quality and a custodian of the records of that division. I am responsible for supervising the state-wide regulatory program for solid waste disposal sites. I am also responsible for implementing the federal Resource Conservation and Recovery Act program in Oregon. As such, I would normally be aware of any litigation concerning violations of the RCRA criteria by any DEQ permitted disposal site.

2. I have been asked by Mr. James G. Driscoll, attorney at law, whether or not this department has ever received a notice from Kim T. Buckley, dated April 16, 1981, or any other formal notice regarding the intent of Mr. and Mrs. Olaf Hallstrom to file suit against the Tillamook County Landfill under the provisions of RCRA. I have no recollection of ever having received such notice. Furthermore, I have had my staff search our files, and we find no evidence that any such notice was ever received.

DATED this ___ day of February, 1983.

_____
Earnest A. Schmidt

(Jurat omitted in printing)

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

Region 10
1200 Sixth Avenue
Seattle, Washington

CERTIFICATION OF ABSENCE OF
ENTRY AND ABSENCE OF RECORD

For purposes of Federal Rules of Evidence 803(7), 803(24), I hereby certify in my official capacity that I have made a diligent search of the relevant record retention depositories of this Agency, and the said search failed to disclose any entries, records, reports, statements or data compilations coming within the following description:

Notice of Intent to File Suit pursuant to 42 U.S.C. §6972 re
Tillamook County Landfill (Plaintiff Hallstrom).

Certifying Employee: /s/ Michael Garcia
(Title): Assistant Regional Counsel

(Jurat omitted in printing)

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Of Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

OLAF A. and MARY HALLSTROM, husband and wife, Plaintiffs, v. TILLAMOOK COUNTY, a municipal corporation, Defendant.	)	Civil No. 82-481 AFFIDAVIT OF JAMES G. DRISCOLL

STATE OF OREGON)
) ss.
County of Multnomah)

I, JAMES G. DRISCOLL, being first duly sworn, do depose and say:

I am an attorney engaged in the private practice of law in Portland, Oregon with the firm of Bullivant, Wright, Leedy, Johnson, Pendergrass and Hoffman. I am one of the attorneys representing the defendant Tillamoook County in this litigation.

On January 14, 1983 I wrote Mr. James Moore, Regional Counsel, Environmental Protection Agency in Seattle, Washington to inquire whether his agency had

ever received formal written notice from the plaintiffs or their attorneys of their intention to file under the provisions of the Solid Waste Disposal Act against Tillamook County for the operation of its landfill.

I was advised by Assistant Regional Counsel, Mr. Michael Garcia, that a search of their records, both in Seattle at the regional headquarters and also in the central administrative offices in Washington, D.C., failed to reveal any notice nor anyone who could recall having seen such a notice.

I thereafter received from EPA a Certificate of Absence of Entry and Absence of Record which I attach to this affidavit.

DATED this ___ day of March, 1983.

James G. Driscoll

(Jurat omitted in printing)

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Of Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

OLAF A. and MARY E. HALLSTROM, husband and wife, Plaintiffs,	)	Civil No. 82-481
v.	)	MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT
TILLAMOOK COUNTY, a municipal corporation, Defendant.	)	

I
INTRODUCTION

Defendant's Motion for Summary Judgment should be denied because any failure to give formal notification to the D.E.Q. and the E.P.A. has been cured, the D.E.Q. and the E.P.A. received actual notice more than 60 days ago, defendant has not been prejudiced, and the purpose of the notice requirements of 42 U.S.C. §§ 6901-87 (Resource Conservation and Recovery Act of 1976) ("RCRA") has been accomplished.

Plaintiffs' live on farmland and tidelands adjacent to the Tillamook County Landfill, which is owned and operated by defendant. In April 1981, plaintiffs sent to

defendant written notice of several violations of RCRA and of plaintiffs' intention to file a citizen's suit under RCRA. Plaintiffs were particularly concerned about surface water and ground water pollution by leachate produced at the site. A copy of the notice is attached as Exhibit A. Copies of the notice were not sent to the D.E.Q. and the E.P.A.

After receiving the notice, defendant made some changes at the site, but the changes were inadequate and did not correct the RCRA violations set forth in plaintiffs' notice. Consequently, plaintiffs' filed this action on April 9, 1982. Depositions have been taken and all requested documents have been produced and inspected.

Despite the lack of formal notice in its files, the D.E.Q. knew that this case had been filed and the substance of plaintiffs' complaints at least as early as June 1982. *See* Interoffice Memo attached to Robert L. Brown's affidavit. The supervisor of the Solid Waste Section of the D.E.Q. knew about this case in December 1982. Robert L. Brown's affidavit at 1-2.

Despite the lack of formal notice in its file, the E.P.A. knew that this case had been filed at least since January 1983, when defendant asked the E.P.A. to search its records for any notices of "intention to file under provisions of the Solid Waste Disposal Act against Tillamook County for the operation of its landfill." *See* James G. Driscoll's affidavit ttached as Exhibit B to defendant's Motion for Summary Judgment.

On March 2, 1983, plaintiffs mailed copies of the April 1981 notice to the E.P.A. (Washington, D.C. and Region 10) and the D.E.Q. together with a notice of this

motion and of plaintiffs' intent to refile this case if necessary. A copy of this notice and the return receipts are attached as Exhibit B.

II

ARGUMENT

A. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE RCRA'S NOTICE REQUIREMENTS SHOULD BE INTERPRETED PRAGMATICALLY.

The Ninth Circuit has not decided what significance should be given the failure of a citizen to give notice of a citizen's suit to the E.P.A. when the E.P.A. is not named as a defendant. The Third Circuit, however, has interpreted identical citizen suit provisions in the Federal Water Pollution Control Act ("FWPCA") to require a pragmatic approach.

In *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reaction*, 619 F.2d 231 (3rd. Cir. 1980) *cert. denied* 449 U.S. 1096, 101 S.Ct. 893, 66 L.Ed2d 824 (1981), plaintiffs sought relief pursuant to the FWPCA, among other theories. Statutory notices were given the E.P.A. and the N.R.C. two days prior to the filing of the lawsuit. The court ruled that "to require dismissal and refiling of premature suits would be excessively formalistic." *Id.* at 243. In that case, the agencies involved had actual notice of the FWPCA violations, and had acted on plaintiff's claim prior to the trial court's disposition of the complaint.

In *Pymatuning Water Shed Citizens for a Hygenic Environment v. Eaton*, 644 F.2d 995 (3rd. Cir. 1981), the Third

Circuit reiterated this rule. In this case, when the defendants moved to dismiss the case for failure to give the statutory notices, the trial court denied the motion, but stayed proceedings until the notices were given. Affirming the trial court's action, the Third Circuit said that . . . "appellant's argument, [that the notice requirement is jurisdictional] . . . if adopted, would frustrate citizen enforcement of the Act . . . [and] . . . be a waste of judicial resources." The court held:

> "Here the district court stayed its proceedings until notice was given to the proper persons and entities. This stay allowed them the time contemplated by the statute for taking appropriate action. Eleven months elapsed before the court began hearing evidence in the case. The district court did not err in exercising its jurisdiction. *Id* at 996-97.

In this case, all the proper entities have had actual notice of this suit for more than 60 days prior to this hearing. The statutory notices were sent to the required agencies March 2, 1983. It would be unduly formalistic to grant defendants' motion and require plaintiffs to refile this lawsuit in May 1983.

A similar rule has been adopted in this district, though under somewhat different circumstances. *Stin v. City of Eugene*, Case No. 80-41 (April 29, 1980) (copy attached). *Stin* is an employment discrimination suit under Title VIII, 42 U.S.C. § 2000e, the Civil Rights Act of 1871, 42 U.S.C. 1983, and the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1). Title VII has a statutorily mandated jurisdictional exhaustion requirement which, though different in form from 42 U.S.C. § 6972 and 33 U.S.C. § 1365, has a similar effect. The claimant must receive a "right to sue letter" from the appropriate agency before initiating

legal action against the offender. 42 U.S.C. 2000e-5(f)(1). The claimant had not received that letter when the action was filed, thought she received it soon thereafter. Judge Juba held that plaintiff's subsequent receipt of the letter effectively complied with the statutory requirements. *Eldridge v. Carpenter* 46 440 F.Supp. 506, 517 (N.D. Cal. 1977). He pointed out that recognizing the subsequently issued letter was both judicially efficient and did not offend any major statutory policies. *Budreck v. Crocker National Bank* 407 F.Supp. 635, 646-47 (N.D. Cal., 1976).

Thus the court took a pragmatic view of that "jurisdictional requirement" similar to the one plaintiffs argue here.

B. THE PURPOSE OF THE NOTICE REQUIREMENT HAS BEEN SERVED.

The overall purpose of the RCRA is to eliminate "the last remaining loophole in environmental law, that of unregulated land disposal and hazardous wastes." [1976] U.S. Code Cong. & Admin. News 6238, 6241. "The existing methods of land disposal often result in pollution, subsurface leachate and surface run-off, which affect air and water quality." *Id.* at 6242. As noted above, plaintiffs' primary concerns are the pollution of surface water and ground water the landfill is causing.

The legislative history of RCRA says little about the purpose of the citizen suit provisions. However, the Federal Water Pollution Control Act, which contains identical citizen suit provisions, sheds more light on their purpose and upon whether or not they were to be seen as jurisdictional.

The purpose of the citizen suit provisions if to "provide for citizen participation in the enforcement of . . . this Act." [1972] U.S. Code Cong. & Admin. News 3668, 3745. The purpose of the notice provisions is to " . . . encourage and provide for agency enforcement" of the Act. *Id.* The waiting period "should give the administrative enforcement office an opportunity to act on the alleged violation." *Id.* Thus, the only purpose behind the sixty day warning period is to give the E.P.A. and the D.E.Q. an opportunity to act against the alleged violation. This purpose is in no way offended if the agency gets notice after the lawsuit is actually filed, so long as the trial court has taken no action on the suit such as issuing an injunction, or temporary restraining order. This interpretation is reenforced by the Senate Conference Report, adopted in relevant part, which states

> "The bill requires that *no action on a suit may begin* for 60 days following notification to the alleged polluter. If the Administration or State begins a civil or criminal action on its own against an alleged polluter, *no court action could take place* on the citizen's suit. [1972] U.S. Code Cong. & Admin. News 3823 (emphasis added).

Thus, at least pursuant to the Senate version of the bill, it envisioned the filing of a complaint prior to the passage of 60 days, so long as no Court action was taken before the 60 day period ended.

C. THIS COURT SHOULD NOT RELY UPON THE CASES CITED BY DEFENDANT.

In *Middlesex County Sewage Authority v. Sea Clammers*, 435 U.S. 1, 98 S.Ct. 906, 55 L.Ed.2d 65 (1980), the Court was never asked to address the question whether the

notice requirement of 42 U.S.C. § 6972 is jurisdictional. The language defendant quotes is from the Court's repetition, in their statement of fact, of the holdings of the trial court; it is not the holding of the Supreme Court. The Court said:

> In holdings relevant here, the District Court rejected respondents' nuisance claim under federal common law, see *Illinois v. Milwaukee*, 406 U.S. 91 (1972), on the ground that such a cause of action is not available to private parties. With respect to the claims based on alleged violations of the FWPCA, the court noted that respondents had failed to comply with the 60-day notice requirement of the "citizen suit" provision in § 505(b)(1)(A) of the Act, 86 Stat. 888, 33 U.S.C. § 1365(b)(1)(A). This provision allows suits under the Act by private citizens, but authorizes only prospective relief, and the citizen plaintiffs first must give notice to the EPA, the State, and any alleged violator. Ibid. Because respondents did not give the requisite notice, the court refused to allow them to proceed with a claim under the Act independent of the citizen-suit provision and based on the general jurisdictional grant in 28 U.S.C. § 1331. The court applied the same analysis to respondents' claims under the MPRSA, which contains similar citizen-suit and notice provisions. 33 U.S.C. § 1415(g). Finally, the court rejected a possible claim of maritime tort, both because they had failed to comply with the procedural requirements of the federal and state Tort Claims Acts. 435 U.S. at 6-8.

The primary question the Court addressed was whether the Third Circuit had been correct in finding an implied right of action under the FWPCA, in addition to the citizen suits provided for in 33 U.S.C. § 1365.

> We granted these petitions, limiting review to three questions: (i) *whether FWPCA and MPRSA imply a private right of action independent of their citizenship provision*, (ii) whether all federal common-law nuisance actions concerning ocean pollution now are pre-empted by the legislative scheme contained in the FWPCA and the MPRSA, and (iii) if not, whether a private citizen has standing to sue for damages under the federal common law of nuisance. We hold that there is no implied right of action under these statutes and that the federal common law of nuisance has been fully pre-empted in the area of ocean pollution. (emphasis added) *Id.* at 10-11.

The Supreme Sourt over-ruled the Third Circuit on the question of the implied cause of action.

The history of the *Sea Clammers* case is germane here, even though its holding does not apply. The Third Circuit opinion, reported at 616 F.2d 1222 (1980), pre-dates *Susquehanna* and *Pymatuning*. In *Sea Clammers*, the Third Circuit affirmed the district court's ruling that the notice requirement was jurisdictional. However, in dicta, the court discussed this "pragmatic approach" it later adopted, choosing not to rule upon it because of its view that there existed an implied cause of action under the FWPCA. 616 F.2d at 1226.

In *Susquehanna*, while *Sea Clammers* was pending before the Supreme Court, the Third Circuit adopted the pragmatic approach to the notice requirement and, as an alternative ground, found plaintiff's had an implied right of action under FWPCA, 619 F.2d at 243. In *Pymatuning*, while *Sea Clammers* was still pending, the Third Circuit explicitly based their decision only upon their pragmatic interpretation of 33 U.S.C. § 1365. 644 F.2d at 996 n.2. Thus while the Supreme Court reiterated the trial court's holding in its opinion, the Third Circuit adopted the pragmatic approach that over-ruled the trial court holding.

McCastle v. Rollins Environmental Services, 514 F.Supp. 936 (M.D.La., 1981), relied upon by defendant, is factually bizarre. There, plaintiffs sued defendant in state court and defendants sought removal to federal court. The trial court addressed the notice issue in this context: Defendants were arguing that plaintiffs had unintentionally pleaded a cause of action under RCRA, thus the federal court had jurisdiction over the matter. It was in this context that the court held the plaintiff had not brought an action under the RCRA, because they had filed no notices. It should be noted that the *McCastle* court relied upon the Third Circuit's decision in the *Sea Clammers* case, an opinion that has been superceded by the *Susquehanna* and the *Pymatuning* cases.

CONCLUSION

This Court should take a pragmatic view of the notice requirements of 42 U.S.C. § 6972. All relevant parties have had actual notice of the pendency of this case for more than 60 days. If the Court finds that insufficient, plaintiffs respectfully request a one month stay of any proceeding to cure any formal failure to give the E.P.A. and the D.E.Q. notice. Such an approach would conserve judicial resources, satisfy the policies behind the Act, and not unduly delay plaintiffs' day in court.

DATED this 22nd day of March, 1983.

Respectfully submitted,
ESLER & SCHNEIDER
By /s/ Robert A. DeGrath
Robert A. DeGrath, No. 78176
Of Attorneys for Plaintiffs

(Certificate of Service omitted in printing)

Michael J. Esler
Kim T. Buckley
ESLER & SCHNEIDER
519 S.W. Park Avenue
Suite 510
Portland, Oregon 97204
(503) 223-1510

Of Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

OLAF A. and MARY E. HALLSTROM, husband and wife, Plaintiffs,	)	Civil No. 82-481
v.	)	AFFIDAVIT OF ROBERT L. BROWN
TILLAMOOK COUNTY, a municipal corporation, Defendant.	)	
STATE OF OREGON	)	
	)	ss.
County of Multnomah	)	

I, ROBERT L. BROWN, on oath say:

1. I am Supervisor of the Solid Waste Section of the Solid Waste Division of the Oregon Department of Environmental Quality and a custodian of the records of that section. I am responsible for supervising the state-wide regulatory program for solid waste disposal sites that do

not involve the disposal of hazardous waste. The Tillamook County Landfill falls within my jurisdiction.

2. I first became aware that this lawsuit was pending in December 1982.

3. Attached to this affidavit is a copy of an Interoffice Memo dated June 29, 1982, taken from DEQ's files. Tim Spencer is an employee of the Oregon Department of Environmental Quality under my supervision.

/s/Robert L. Brown
Robert L. Brown

(Jurat omitted in printing)

STATE OF OREGON
DEPARTMENT OF ENVIRONMENTAL QUALITY — *INTEROFFICE MEMO*

TO: Tom Bispham, NW Region — DATE: June 29, 1982

FROM: Tim Spencer, SW

SUBJECT: Tillamook Landfill – Monitoring Wells

On May 19, 1982, Greg Pettit (DEQ Laboratory staff) and I visited the Tillamook Landfill for a routine water quality sampling run. Sampling efforts were hampered, however, because two of the monitoring wells are damaged:

(1) Well no. 3 (the upgradient well) – The casing is bent because of landsliding. We were able to sample well no. 3 but could not bail it. Consequently, our most recent sample results and future samples may not be representative of actual water quality conditions in the groundwater system at this location.

(2) Well no. 1 – the shallow well casing is obstructed. We were unable to bail or sample this well.

Recommendations

I recommend that we pressure the county to repair or replace the monitoring wells quickly. Overall, the county has done a poor job of maintaining the monitoring wells (see past correspondence in file). Prompt action is especially important in light of the ongoing leachate problems at the site and the legal action that has been initiated against the landfill by a local resident (Mr. Hallstrom vs. Tillamook County). Mr. Hallstrom has retained a consulting geologist to investigate the landfill.

I will follow this up with a more detailed memo describing overall conditions at the landfill.

SC531
cc: John Smits, Astoria Office

EXHIBIT "A"

ESLER & SCHNEIDER
Attorneys at Law
610 S.W. Broadway, Suite 510
Portland, Oregon 97205
(503) 223-1510

April 16, 1981

Mr. Jerry Woodward
Tillamook County
Commissioner
Tillamook County Courthouse
Tillamook, Oregon 97141

CERTIFIED MAIL
RETURN RECEIPT
REQUESTED

Re: Tillamook County Landfill – Notice of Intent to file Suit Pursuant to 42 U.S.C. § 6972

Dear Mr. Woodward:

This office represents Mr. and Mrs. Olaf Hallstrom. This letter is written to you pursuant to 42 U.S.C. § 6972 and 40 C.F.R. § 254.

Please take notice that Mr. and Mrs. Hallstrom intend to file a citizen's suit in United States District Court for the District of Oregon against Tillamook County and its commissioners, administrators, and employees responsible for the Tillamook County landfill.

Since it became a solid waste disposal site, the Tillamook County Landfill has been and continues to be in violation of the following statute and regulations:

42 U.S.C. § 6945
40 C.F.R. §§ 241.200-1, 241.202-1, 241.203-1, 241.204-1, 241.205-1, 241.207-1, 241.208-1, 241.209-1, and 241.210-1.
40 C.F.R. §§ 257.1, 257.3-1, 257.3-2, 257.3-3, 257.3-4, 257.3-6. amd 257.3-7.
40 C.F.R. §§ 264.1-.77
40 C.F.R. §§ 265.1-.94 and 265.220-.315

The Tillamook County Landfill is being operated as an illegal open dump. From time to time, hazardous wastes have been disposed of on the site. Water discharged from the site is contaminated with dangerously high concentrations of hazardous waste and dissolved solids. Emissions, including dust, from the site violate applicable air quality standards. Conditions are maintained at the site which are favorable for the harboring, feeding, and breeding of vectors. The surface area of the exposed solid waste has not been minimized, cover material has not been applied, and the solid waste has not been compacted. The site was improperly designed, and measures taken to treat the leachate produced at the site have been grossly inadequate. The leachate produced at the site has been allowed to drain onto the Hallstrom's land and the tidewater areas adjacent to the site.

Tillamook County is the owner of the Tillamook County Landfill, and it is responsible for these violations.

Mr. and Mrs. Hallstrom's address and telephone number are

1350 Hallstrom Road
Tillamook, Oregon 97141
(503) 842-6962

As noted above, they have retained this office to represent them in this matter. Accordingly, please direct all inquiries and responses to Michael Esler or Kim Buckley of this office.

Very truly yours,
/s/ Kim T. Buckley
Kim T. Buckley

KTB:meg
cc: Mr. and Mrs. Olaf Hallstrom

(Post Office Return Receipts from Tillamook County omitted in printing)

EXHIBIT "B"

ESLER & SCHNEIDER
Attorneys at Law
510 Park Washington Building
519 S.W. Park Avenue
Portland, Oregon 97205

March 2, 1983

Kim T. Buckley 503-223-1510

Solid Waste Administrator
Tillamook County Courthouse
201 Laurel Avenue
Tillamook, Oregon 97141

CERTIFIED MAIL
RETURN RECEIPT
REQUESTED

Administrator
Environmental Protection Agency
Washington, D.C. 20460

Regional Administrator
Environmental Protection Agency, Region 10
1200 Sixth Avenue
Seattle, Washington

Mr. Ernest A. Schmidt
Administrator, Solid Waste Division
Department of Environmental Quality
P.O. Box 1760
Portland, Oregon 97207

Re: *Hallstrom v. Tillamook County*, United States District Court, District of Oregon, Civil No. 82-481
Tillamook County Landfill – Notice of Pending Litigation and Intent to File Suit Pursuant to 42 U.S.C. § 6972 and 40 C.F.R. § 254

Gentlemen:

Here is a copy of a letter I sent to Tillamook County on April 16, 1981, advising the county that I intended to file a citizen's suit pursuant to 42 U.S.C. § 6972. Copies of the notice were not mailed to you as a result of inadvertence. A citizen's suit was filed more than 60 days after the enclosed notice was sent to Tillamook County.

Tillamook County has filed a motion requesting judgment in its favor because the enclosed notice was not sent to you. I intend to ask the court to stay the case for 60 days to satisfy any objection Tillamook County might have to any failure of notice. If the court allows Tillamook County's motion for summary judgment, I will refile this case upon expiration of the 60-day period and seek an expedited trial date.

The conditions and violations described in the enclosed notice continue to exist despite efforts by Tillamook County since April 16, 1981.

Very truly yours,

ESLER & SCHNEIDER

By: /s/ Kim T. Buckley
Kim T. Buckley
Of Attorneys for Olof A. and Mary Hallstrom

KTB:meg
cc: Atorney General of the United States
Mr. and Mrs. Olof Hallstrom
Mr. James G. Driscoll
Enclosure

ESLER & SCHNEIDER
Attorneys at Law
610 S.W. Broadway, Suite 510
Portland, Oregon 97205
(503) 223-1510

April 16, 1981

Mr. Jerry Woodward
Tillamook County
Commissioner
Tillamook County Courthouse
Tillamook, Oregon 97141

CERTIFIED MAIL
RETURN RECEIPT
REQUESTED

Re: Tillamook County Landfill – Notice of Intent to File Suit Pursuant to 42 U.S.C. § 6972

Dear Mr. Woodward:

This office represents Mr. and Mrs. Olaf Hallstrom. This letter is written to you pursuant to 42 U.S.C. § 6972 and 40 C.F.R. § 254.

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40 C.F.R. §§ 241.200-1, 241.202-1, 241.203-1, 241.204-1, 241.205-1, 241.207-1, 241.208-1, 241.209-1, and 241.210-1.
40 C.F.R. §§ 257.1, 257.3-1, 257.3-2, 257.3-3, 257.3-4, 257.3-6, and 257.3-7.
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40 C.F.R. §§ 265.1-.94 and 265.220-.315

The Tillamook County Landfill is being operated as an illegal open dump. From time to time, hazardous wastes have been disposed of on the site. Water discharged from the site is contaminated with dangerously high concentrations of hazardous waste and dissolved solids. Emissions, including dust, from the site violate applicable air quality standards. Conditions are maintained at the site which are favorable for the harboring, feeding, and breeding of vectors. The surface area of the exposed solid waste has not beene minimized, cover material has not been applied, and the solid waste has not been compacted. The site was improperly designed, and measures taken to treat the leachate produced at the site have been grossly inadequate. The leachate produced at the site has been allowed to drain onto the Hallstrom's land and the tidewater areas adjacent to the site.

Tillamook County is the owner of the Tillamook County Landfill, andit is responsible for these violations.

Mr. and Mrs. Hallstrom's address and telephone number are

1350 Hallstrom Road
Tillamook, Oregon 97141
(503) 842-6962

As noted above, they have retained this office to represent them in this matter. Accordingly, please direct all inquiries and responses to Michael Esler or Kim Buckley of this office.

Very truly yours,

/s/ Kim T. Buckley
Kim T. Buckley

KTB:meg
cc; Mr. and Mrs. Olaf Hallstrom

(Post Office Return Receipts from the EPA, Tillamook County, DEQ, Regional Administrator of EPA omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

KAREN STEIN, Plaintiff, v. CITY OF EUGENE, CHARLES T. HENRY, individually and in his capacity as City Manager, City of Eugene, and GARY LONG, individually and in his capacity as Personnel Director City of Eugene, Defendants.	Civil No. 80-41 FINDINGS AND RECOMMENDATION AND ORDER (Filed April 29, 1980)

Plaintiff alleges that her former employer, the City of Eugene (City), discriminated against her on the basis of her sex in violation of Title VII, 42 U.S.C. § 2000e, the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1).

The City now moves the court for an order designating Eugene as the place where all pre- and post-trial matters will be heard and as the place of trial. In her

affidavit, the City's attorney states that the events underlying this action occurred in Eugene, all defendants, witnesses, and all records are located in Eugene, and defendants' attorneys are located in Eugene. She states that the only person connected with this action who is located in Portland is plaintiff's co-counsel, Clinton Lonergan. (Plaintiff's counsel, Mr. Oler, is located in San Francisco.) Defendant's motion is unopposed.

Pursuant to Local Rule 2, Eugene may be designated as the place of trial for actions arising in Lane County. The City's motion for all pretrial and post-trial proceedings, and for trial in Eugene is granted.

The City also moves to dismiss plaintiff's Title VII claim for lack of subject matter jurisdiction. The City contends that plaintiff failed to obtain a "Notice of Right to Sue" letter before filing this action, as required by 42 U.S.C. § 2000e-5(f)(1). In paragraph 7 of her complaint, plaintiff alleges that she has "duly requested a 'Notice of Right to Sue' letter and accordingly awaits receipt of same." Plaintiff contends this jurisdictional prerequisite has been cured. On January 25, 1980, eleven days after this action was filed, plaintiff was sent a "Notice of Right to Sue" Letter. (See Exhibit A to Declaration of Curtis G. Oler.)

Courts within the Ninth Circuit have recognized that "subsequent receipt of a right-to-sue letter can cure the jurisdiction in a suit initially filed without one." *Eldredge v. Carpenters 46*, 440 F.Supp. 506, 517 (N.D. Cal. 1977); *Budreck v. Crocker National Bank*. 407 F.Supp. 635, 646-647 (N.D. Cal. 1976). *See also, Berg v. Richmond Unified School District*, 528 F.2d 1208, 1212 (9th Cir, 1975), *vacated on*

other grounds 434 U.S. 158 (1977). Although a right-to-sue letter is considered to be a jurisdictional prerequisite to filing a Title VII action, "recognition of a subsequently issued letter is judicially efficient and does not offend any major statutory policies." *Budreck, supra,* 407 F.Supp. at 646. Since plaintiff obtained a right-to-sue letter very shortly after she filed her complaint, she has effectively complied with the requirements of 42 U.S.C. § 2000e-5(f)(1).

Defendant's motion to dismiss plaintiff's Title VII claim for lack of subject matter jurisdiction should be denied.

Dated this 29 day of April, 1980.

/s/ George E. Juba
United States Magistrate

Ronald E. Bailey
James G. Driscoll
BULLIVANT, WRIGHT, LEEDY, JOHNSON,
PENDERGRASS & HOFFMAN
1000 Willamette Center
121 S.W. Salmon Street
Portland, Oregon 97204
Telephone: (503) 228-6351

Of Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

OLAF A. and MARY HALLSTROM, husband and wife,	)	Civil No. 82-481
Plaintiffs,	)	REPLY TO PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
v.	)	
TILLAMOOK COUNTY, a municipal corporation,	)	
Defendant.	)	

I

INTRODUCTION

In their Memorandum in Opposition to the defendant's Motion for Summary Judgment, the plaintiffs advance two arguments why this Court should ignore the plain language of the statute and allow the plaintiffs to proceed, despite the admitted failure to comply with the notice requirements of the Solid Waste Disposal Act (SWDA) (42 USC § 6901-6987).

The plaintiffs first argue that there has been actual notice and substantial compliance with the notice requirement sufficient to accomplish its purposes. For their

second argument, the plaintiffs cite two decisions from the Third Circuit Court of Appeals, for the proposition that notice is neither jurisdictional nor a prerequisite as a matter of law: *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reaction*, 619 F2d 231 (3rd Cir. 1980) cert. denied, 449 US 1096, 101 S.Ct. 893, 66 L.Ed.2d 824 (1981) and *Pymatuning Watershed Citizens For A Hygenic Enviroment v. Eaton*, 644 F2d 995 (3rd Cir. 1981).

Plaintiffs' first argument is effectively refuted by the statement of facts set forth in its own Memorandum. Plaintiffs' second argument, to the extent that it ever existed under the *Susquehanna* and *Pymatuning* decisions, has been expressly rejected by the United States Supreme Court in the case of *Middlesex Co. Sewerage Authority v. Sea Clammers*, 453 US 1, 69 L.Ed.2d 435, 101 S.Ct. 2615 (1981).

II

PURPOSE OF THE NOTICE REQUIREMENT

The plaintiffs' Memorandum discusses the purpose behind the federal pollution control legislation, including RCRA, and also the purpose behind the citizens' suit provisions in those Acts. However, the Memorandum is notably silent as to the purpose *of the notice requirement*.

That question was, however, addressed in the case of *So.Car. Wildlife Federation v. Alexander*, 457 F.Supp. 118 (D.SC 1978). That case involved an effort to stop the construction and potential operation of one dam and the continuing operation of two existing dams on the grounds that the dams would constitute sources of pollution in violation of the Federal Water Pollution Control

Act (FWRCA). However, the plaintiffs' prior notice of their claim mentioned only the one dam that had not yet been constructed. With respect to any claim concerning either of the other two, already existing dams, the Court held that the failure to mention them in the notice of claim defeated the purpose of the notice requirement and therefore barred any claims with respect to those two dams. The Court stated:

> " . . . The omission of Clark Hill and Hartwell as sources of violations would not provide defendants with notice sufficient to allow possible administrative resolution of the claims as to those projects. Plaintiffs' argument that defendants have not been prejudiced by these omissions because the filing of the suit in this court gave them actual notice simply begs the question. One of the major purposes of the notice provision is to allow for possible administrative resolution *prior* to filing suit. Since the notice is jurisdictional such a significant omission divests this court of the authority to further proceed with an adjudication of this matter as it relates to Hartwell and Clark Hill. . . . " (457 F.Supp. at 124) (Orig. emphasis).

If the purpose of the notice provision is to allow for possible administrative resolution of the plaintiffs' claims prior to the filing of a lawsuit, that purpose has clearly not been accomplished in the present case. Although the plaintiffs filed their suit in April 1982, the Department of Enviromental [sic] Quality (DEQ) did not learn of the claim until December 1982, and the Enviromental [sic] Protection Agency (EPA) did not learn of it until January, 1983. See the Affidavits of Ernest A. Schmidt and James G. Driscoll and attached Certificate of Absence of Entry and Absence of Record of EPA, attached to defendant's Motion for Summary Judgment. See also the Affidavit of

Robert L. Brown and the Statement of Facts set forth in the Introduction in the plaintiffs' Memorandum in Opposition.

The plaintiffs suggest that the Department of Eviromental [sic] Quality may have had actual knowledge of this lawsuit as early as June 29, 1982, based upon an inter-office memo from the files of DEQ. In the first place, it is apparent from the Affidavits of Mr. Schmidt and Mr. Brown that any knowledge of this litigation did not reach to the level of any person in authority within the agency. Mr. Schmidt identifies himself in his Affidavit as the Administrator of the Solid Waste Division of DEQ, responsible for supervising solid waste disposal sites and for implementing RCRA in Oregon. Mr. Brown identifies himself in his Affidavit as the Supervisor of the Solid Waste Section of the Solid Waste Division of DEQ and responsible for supervising solid waste disposal sites that do not involve hazardous waste, including the Tillamook County landfill. Both Affidavits establish that neither of these individuals had any actual notice or knowledge of this litigation until December 1982.

Moreover, it is doubtful that the inter-office memo even refers to this litigation. The plaintiffs have previously filed a lawsuit in Tillamook County Circuit Court alleging claims of trespass and nuisance against Tillamook County for the operation of the sanitary landfill. That action was voluntarily dismissed by the plaintiffs shortly before filing the present proceeding in Federal Court. That lawsuit did not involve any claims of violations of any federal standards, and therefore would not have served as notice, actual or constructive, of any claims under RCRA. Given the lack of any action on the

part of DFQ from June to December 1982, it appears much more likely that the reference in the inter-office memo is to the earlier, state court, litigation. Knowledge of that litigation would not constitute notice, either actual or constructive, of the present claims.

Plaintiffs concede that neither EPA nor DEQ had any notice or knowledge of this lawsuit prior to the time it was filed, and it appears from the record that neither agency had either notice or knowledge of these claims for nine to ten months thereafter. Moreover, plaintiffs concede they only gave notice to these agencies within the last 30 days. Under these circumstances, it is apparent that the plaintiffs have not "substantially complied" with the statutory requirement that they give notice of the claimed violations of the federal standards to these two agencies at least 60 days *prior* to commencing litigation.

Moreover, it is equally apparent that the purposes of the notice requirement have not been served. Neither EPA nor DEQ have had an opportunity to consider the plaintiffs' claims and address them through available administrative procedures, thereby perhaps resolving quickly and efficiently whatever problems may exist without imposing upon the defendant the burden and expense of this litigation.

III

LEGAL SUFFICIENCY OF NOTICE

No case cited by the plaintiffs supports the exercise of subject matter jurisdiction by this Court under the present circumstances, and the arguments and authorities cited by the plaintiffs have been rejected by the United States Supreme Court.

Defendants agree that prior court decisions have found legally sufficient notice where the agency in question had actual knowledge of the plaintiffs' claims more than 60 days prior to the filing of the lawsuit, although there may have been lack of any formal notice to the agency. See, e.g., *Save Our Sound Fisheries Assn. v. Callaway,* 429 F.Supp. 1136 (D.RI 1977). Other federal courts have found jurisdiction for these types of citizens' suits despite lack of the 60-day prior notice either by implying a private right of action under the statutes but separate from the express citizen suit provisions (*Nat'l. Sea Clammers Assn. v. City of New York,* 616 F2d 1222 (3rd. Cir. 1980)), while others have characterized these claims as federal common law nuisance claims and found jurisdiction under the general federal question jurisdiction of 28 USC 1331 (*Twp. of Long Beach v. City of New York,* 445 F.Supp. 1203 (D.NJ 1978). Finally, some courts have found substantial compliance where the agency had actually received notice of the claims prior to the filing of the lawsuit and had in fact reviewed the matter and made an agency determination prior to any action by the federal court (*Susquehanna Valley Alliance v. Three Mile Island, supra*). This elastic approach to jurisdiction has been

expressly repudiated by the Supreme Court in the *Middlesex Co. Sewerage Authority* case.

The plaintiffs seek to limit the holding in *Middlesex* by ignoring the actual decision of the Court. In that case, the Supreme Court considered the jurisdictional basis for claims for water pollution brought by private citizens. The Court quoted *with approval* the district court decision that the plaintiffs could not proceed under the citizens' suit provisions of either FWPCA or the Marine Protection, Research, and Sanctuaries Act (MPRSA) *because the plaintiffs had failed to give 60 days prior notice as required by those Acts!* (453 US at 6-7).

The Court then went on to hold that there was no implied right of action under those statutes which would permit an action *absent* compliance with the notice requirement (453 US at 11). The Court also held that Congress intended these statutes to preempt the area of water pollution, and therefore there was no right of action under either federal common law or under 28 USC § 1983.

Contrary to the plaintiffs' assertion, the Supreme Court in *Middlesex* directly addressed the notice requirement as a jurisdictional prerequisite. In discussing the citizens' suit provisions of FWPCA and MPRSA, the Court stated:

> ". . . These citizen suits provisions authorize private persons to sue for injunctions to enforce these statutes. Plaintiffs invoking these provisions first must comply with specified procedures – which respondents here ignored – including in most cases 60 days prior notice to potential defendants." (453 US at 14).

After disposing of all alternative bases for jurisdiction, the Court concluded by expressly holding that the plaintiffs were barred from maintaining *any* claim because they had failed to comply with the notice requirement and no other basis for federal jurisdiction existed. The concluding paragraph of the Court's decision states:

> "We therefore must dismiss the federal common law claims because their underlying legal basis is now preempted by statute. *As discussed above, we also dismiss the claims under MPRSA and the FWPCA because respondents lack a right of action under those statutes.* We vacate the judgment below with respect to these two claims and remand for further proceedings." (453 US at 22).

The gist of the *Middlesex* Decision is that claims such as the present lawsuit may be brought only under the relevant regulatory statutes (in this case, RCRA) and only in strict compliance with the procedural requirements of those statutes. The Third Circuit's Decision in *Sea Clammers* was expressly overruled. Since the decisions cited by the plaintiffs, *Susquehanna* and *Pymatuning*, relied upon the Third Circuit's Decision in *Sea Clammers for their result, they too must fall. See the discussion in Susquehanna* at 619 F2d 243 and in *Pymatuning* at 644 F2d 996.

CONCLUSION

Plaintiffs concede that they have wholly failed to comply with the statutory notice requirement under RCRA. Neither DEQ nor EPA had notice or knowledge, actual or constructive, of the plaintiffs' claims at any time prior to the filing of this lawsuit, nor for nine to ten month thereafter. It is clear that the purpose of the notice

requirement has not been served, since there has been no opportunity for prior, and possibly dispositive, agency action on the plaintiffs' complaints. Moreover, it is apparent that the defendant has been prejudiced by the plaintiffs' failure in this regard. The defendant has been subjected to the burden and expense of having to defend this lawsuit, when the entire matter might have been resolved expeditiously by EPA and DEQ.

It is equally apparent that any problems resulting from any delay were invited by the plaintiffs. In their Complaint, the plaintiffs specifically allege that they had given notice "More than 60 days prior to the commencement of this action . . . pursuant to 42 USC § 6972 and 40 CFR § 254." (Complaint, p.3, Par.10, 11. 19-21). It is apparent from the face of the Complaint that the plaintiffs were aware from the outset of the existence of this requirement and simply declined to take the necessary steps to comply with it.

Plaintiffs fundamental problem is that they seek to ignore the plain language of the statute, as construed by the United States Supreme Court. Under the present circumstances, this Court simply lacks subject matter jurisdiction and the case must be dismissed.

Respectfully submitted this 1st day of April, 1983.

BULLIVANT, WRIGHT, LEEDY, JOHNSON
PENDERGRASS & HOFFMAN

By (SIGNED) RONALD E. BAILEY
Ronald E. Bailey

By (SIGNED) JAMES G. DRISCOLL
James G. Driscoll

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

OLAF A. and MARY HALLSTROM, husband and wife, Plaintiffs, v. TILLAMOOK COUNTY, a municipal corporation, Defendant.	CIVIL NO. 82-481 ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (MOTION TO DISMISS) (Filed April 22, 1983)

Defendant Tillamook County seeks dismissal of plaintiffs' complaint. The motion is framed as one for summary judgment under Fed. R. Civ. P. 56. However, it is more accurately characterized as one for dismissal for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). Defendant contends that plaintiffs have failed to strictly comply with the provisions of 42 U.S.C. § 6972 under which they claim subject matter jurisdiction. *See also* 40 C.F.R. § 254.2(a)(2).

Section 6972 of the Resource Conservation and Recovery Act of 1976 (RCRA) provides for sixty (60) days notice of intent to file suit to the Environmental Protection Agency (EPA), to the relevant State authorities, and to the alleged violator. *See* 42 U.S.C. § 6972(b)(1). Notification is required before individual enforcement action may proceed. *Id.* Tillamook claims that plaintiffs failed to notify either the EPA or the Oregon Department of Environmental Quality (DEQ), prior to the filing of this lawsuit. Because of this defect, Tillamook argues that plaintiffs lack jurisdiction over them as well.

The purpose of the notice requirement is to allow administrative agencies an opportunity to cure any alleged violations. *South Carolina Wildlife Federation v. Alexander,* 457 F.Supp. 118, 124 (D.S.C. 1978). Defendant Tillamook County received notice from plaintiffs of their intent to file suit in April, 1981. Since then, defendant has done nothing to correct any of the alleged violations. Tillamook has also actively participated in this action since its filing in April, 1982.

Neither the EPA nor the DEQ is a party in this action. In addition, plaintiffs have cured any defect by formally notifying the EPA and DEQ on March 2, 1983. The agencies have sixty (60) days from that date to take appropriate steps to cure any violations it finds at the Tillamook County Landfill. Over thirty (30) days have passed with no action from either State or Federal officials.

To grant defendant's motion based on the notice provision would be a waste of judicial resources. *Pymatuning Water Shed Citizens v. Eaton,* 644 F.2d 995, 996 (3rd Cir. 1981); *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor,* 619 F.2d 231 (3rd Cir. 1980), *cert. denied,* 449 U.S. 1096 (1981).

Defendant's motion to dismiss for lack of subject matter jurisdiction is hereby DENIED.

IT IS SO ORDERED.

DATED this 22 day of April, 1983.

/s/ Owen M. Panner
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

OLAF A. and MARY E. HALLSTROM, husband and wife, Plaintiffs, vs. TILLAMOOK COUNTY, a municipal body, Defendant.	)	Civil No. 82-481 PRETRIAL ORDER

The following proposed Pretrial Order is lodged with the court pursuant to L.R. 235-2.

1. *Nature Of Action.*

This is a suit brought under the provisions of 42 U.S.C. § 6972 [the Resources Conservation and Recovery Act of 1976 (RCRA), as amended], against defendant Tillamook County, the owner and operator of the Tillamook County Landfill.

Plaintiffs' Position

Plaintiffs allege that the Tillamook County Landfill is being operated in violation of the standards and requirements established under RCRA. Plaintiffs also assert pendent state law claims against defendant Tillamook County for common law nuisance and trespass and for inverse condemnation.

Plaintiffs seek injunctive relief restraining defendant from operating the Tillamook County Landfill until it has been brought into compliance with the Resource Conservation and Recovery Act and the regulations enacted thereunder, and plaintiffs seek damages for the alleged nuisance, trespass, and inverse condemnation.

Defendant's Position

Defendant contends it has operated the Landfill in compliance with the standards and regulations established under RCRA. Defendant denies there has been any trespass or nuisance or any inverse condemnation of plaintiffs' property from the operation of the Landfill.

Trial will be to a jury.

2. *Subject Matter Jurisdiction.*

The plaintiffs assert jurisdiction of this Court under 28 U.S.C. § 1331 (federal question) and 42 U.S.C. § 6972.

Jurisdiction of the nuisance, trespass, and inverse condemnation claims is asserted as arising out of a common nucleus of operative facts.

3. *Agreed Facts As To Which Relevance Is Not Disputed.*

Plaintiffs are Oregon residents who own and reside on a commercial dairy farm located adjacent to the Tillamook County Sanitary Landfill.

Tillamook County is a municipal body duly organized and existing under Oregon law with power of eminent domain.

Prior to 1949 Tillamook County established a County solid waste disposal site on an 80 acre parcel of forest land owned by the County and located approximately three miles south of the town of Tillamook. Since 1951 the plaintiffs have owned property adjacent to the County's land. At all times from 1951 to the present the plaintiffs have resided on their land, and, at all times from 1951 to 1979, the plaintiffs have operated a successful commercial dairy farm on their property. Since 1979 the plaintiffs have leased the dairy operation to a neighbor, who has continued to operate the dairy farm to the present time.

In 1975 Tillamook County began a study to identifv the best site in the County for a modern solid waste disposal facility. The study was completed in 1978. The existing County waste disposal sites located near the towns of Manzanita and Pacific City were closed and all solid waste disposal activities in the County were concentrated at the main County facility near the plaintiffs' property. Subsequent to 1978, the main County solid waste disposal facility was converted from an open burning dump to a landfill.

Since at least 1974 plaintiffs have repeatedly complained to Tillamook County about the operation of the

main solid waste disposal site and have claimed that contaminated water from the site has polluted their property. Since at least 1974 plaintiffs have repeatedly complained that the solid waste disposal site was causing contamination of the land and water surrounding the site.

In April 1979 plaintiffs sued Tillamook County in State Circuit Court for pollution of their property by the solid waste disposal site.

On April 20, 1981, plaintiffs gave Tillamook County written notice of the claims against the County asserted by them in this case. Plaintiffs filed this action against Tillamook County on April 9, 1982. On March 2, 1983, the plaintiffs gave written notice of their claims to EPA and DEQ.

4. *Agreed Facts As To Which Relevance Is Disputed.*

The permit to operate the landfill issued by DEQ in April, 1981 required daily compacting of all solid waste deposited at the site and weekly covering with at least six inches of compacted earth. This permit required the area of exposed solid waste not to exceed 50 feet by 100 feet. The permit required a leachate system that would not discharge any leachate off of the site or over the containment berm.

The solid waste disposal cells at the Tillamook County Landfill are not lined with an impermeable membrane.

The original solid waste containment cell was located over a natural spring.

5. *Contentions Of Fact.*

PLAINTIFFS'

1.) The Tillamook County Landfill is an illegal open dump.

2.) There are inadequate controls to prevent the disposal of hazardous wastes on the site. Solid waste disposed on the site is inspected for hazardous waste only cursorily, if at all. The site was not designed to handle hazardous waste.

3.) Surface water and leachate has been discharged from the Tillamook County Landfill onto plaintiffs' farmland and off the County's land on a regular basis. The groundwater under the site and plaintiffs' farmland is contaminated with dangerously high concentrations of hazardous wastes, dissolved solids, and chemicals. These concentrations exceed applicable water quality requirements.

4.) Emissions, including dust, from the Tillamook County Landfill violate applicable air quality requirements and adversely effect the quality of air around plaintiffs' residence and farmland.

5.) Conditions are maintained at the site that are favorable for the harboring, feeding, and breeding of vectors, particularly seagulls. These conditions violate applicable solid waste disposal site requirements.

6.) The surface area of exposed solid waste has not been minimized, contrary to DEQ Permit requirements and applicable solid waste disposal site requirements. Adequate and effective cover material has not been

applied, and the solid waste has not been compacted on a daily basis as required.

7.) The landfill was improperly designed, and the site was poorly chosen. The site geology is likely to cause groundwater contamination and surface water runoff.

8.) Measures taken to treat the leachate produced at the site have not been effective. The leachate distribution system was approved by DEQ on an experimental basis. It is an experiment that failed because leachate is discharged on a regular basis from the Tillamook County Landfill onto the surrounding land and tidelands.

9.) The leachate produced at the site has been allowed to drain onto plaintiffs' land, the tidewater areas adjacent to the site, and into Sutten Creek and the Tillamook River. The leachate discharged onto plaintiffs' land contained a gas and oil residue. The leachate distribution system designed by Tillamook County and Boatwright Engineering has been ineffective and inadequate.

10.) Leachate production at the Tillamook County Landfill has also resulted in the contamination of groundwater beneath plaintiffs' residence and farmland without the consent and contrary to the desire of plaintiffs. Since service of the notice of intent to sue, contamination of groundwater has substantially increased and the leachate system has failed.

11.) Defendant's conduct has unreasonably interfered and continues to interfere with plaintiffs' use and enjoyment of their residence and farmland.

12.) Defendant Tillamook County has failed and refused to control the continuing contamination of the

land surrounding the Tillamook County Landfill. Defendant Tillamook County has continued to operate the Tillamook County Landfill in violation of the DEQ Permit.

13.) Efforts to maintain the operation of the Tillamook County Landfill have been inadequate and poorly conceived.

14.) Defendant's conduct constitutes a taking of plaintiffs' land for public use without just compensation. The taking occurred after mid-1980 when plans were finalized to convert the burning dump to a Landfill.

15.) As a result of defendant's trespass, nuisance, and wrongful taking of plaintiffs' land, plaintiffs have been damaged by more than $210,000.00.

16.) More than 60 days before the commencement of this action, plaintiffs served a Notice of Intent to file a citizen suit pursuant to 42 U.S.C. § 6972 and 40 C.F.R. § 254.

17.) Plaintiffs' property includes tidelands.

18.) Leachate produced at the Tillamook County Landfill has been discharged upon plaintiffs' real property without the consent and contrary to the desire of the plaintiffs.

19.) The blowing of debris (e.g., paper and plastic bags) has been a constant problem of the Tillamook County Landfill.

20.) Since 1979 the lessee of plaintiffs' dairy has kept the milk-producing portion of the herd on the far side of Beaver Creek away from the Landfill.

21.) The geologist hired by the County as part of the 1978 study wrote that the burning dump was probably not developable, but that 80 acres owned by the County nearby may warrant further consideration.

22.) The cost of converting the open burning dump to a Landfill was $193,770 plus engineering costs.

23.) From May 31, 1979, through April 22, 1979, Tillamook County operated its solid waste disposal facility without a DEQ permit.

24.) Since March 2, 1983, Tillamook County has not been instructed to do anything concerning the Landfill by DEQ or EPA.

25.) Except as admitted above, plaintiffs deny defendant's factual contentions.

DEFENDANT'S

1.) Since 1975 Tillamook County has at all times operated its solid waste disposal facility under a series of permits from the State of Oregon Department of Enviromental [sic] Quality (DEQ). No citations have ever been issued by DEQ against Tillamook County for this operation.

2.) Tillamook County has at all times operated the facility in question in compliance with a State plan for the elimination or amelioration of conditions which might otherwise constitute prohibited forms of waste disposal.

3.) Operation of the Tillamook County Sanitary Landfill has not violated the applicable standards and regulations established by the EPA under RCRA.

4.) Federal standards and regulations under RCRA for the construction and operation of solid waste disposal facilities were first promulgated by the Enviromental [sic] Protection Agency (EPA) on July 31, 1979. These regulations first became applicable to solid waste disposal facilities in the State of Oregon on June 22, 1982.

5.) Operation of the Tillamook County facility has not resulted in pollution of the land, surface water, ground water, or air in the vicinity of the landfill. In particular, operation of the landfill has not resulted in pollution or contamination of the plaintiffs' property or water flowing through or under plaintiffs' property.

6.) Tillamook County has not allowed disposal of hazardous waste materials as defined by EPA at its solid waste disposal facility except as allowed by special authorization of DEQ. Tillamook County maintains adequate procedures to inspect and prevent disposal of unauthorized hazardous waste at its disposal facility.

7.) The site of the Tillamook County Sanitary Landfill was properly chosen, the facility was properly designed and constructed, and the facility has been properly operated and maintained by Tillamook County at all times. Conversion of the open dump to a sanitary landfill after 1978 cost in excess of $1,000,000, and is ongoing to the present day.

8.) The operation of the sanitary landfill has not unreasonably interfered with plaintiffs' use and enjoyment of their property so as to effectively deprive them of substantially all beneficial use of that property.

9.) The operation of the sanitary landfill has not interfered with plaintiffs' use and enjoyment of their property so as to effectively deprive them of substantially all beneficial use of that property.

10.) Plaintiffs have been aware of the damages claimed in this proceeding and of the County's involvement in those claims for more than 180 days prior to their written notice of claim.

11.) Plaintiffs have been aware of the basis for their claims for trespass and nuisance and of the County's involvement in those matters for more than two years prior to the filing of this action.

12.) Plaintiffs have been aware of the basis for their claim for inverse condemnation and of the County's involvement in that matter for more than six years prior to the filing of this action.

13.) Except as admitted above, defendant denies plaintiffs' factual contentions.

6. *Contentions Of Law.*

PLAINTIFFS'

1.) Defendant Tillamook County owns and operates an illegal open dump, the Tillamook County Landfill, in Tillamook County, Oregon, in violation of the following statutes and regulations:

42 U.S.C. § 6945
40 C.F.R. §§ 241.200-1, 241.202-1, 241.203-1, 241.204-1, 241.205-1, 241.207-1, 241.208-1, 241.209-1, and 241.210-1 [effective 1974]
40 C.F.R. §§ 257.1, 257.3-1, 257.3-2, 257.3-3, 257.3-4, 257.3-6, and 257.3-7 [effective October 15, 1979]

40 C.F.R. §§ 264.1-.77 [effective November 9, 1980]
40 C.F.R. §§ 265.1-.94 and 265.220-.315. [effective November 9, 1980]
OAR Chapter 342, Divisions 61, 62, and 63.

2.) The "requirement" sections of 40 C.F.R. Part 241 delineate minimum levels of performance required of any solid waste land disposal site operation. The "criteria" of 40 C.F.R. Part 257 are for determining whether a solid waste disposal facility is an illegal open dump.

3.) Plaintiffs are entitled to injunctive relief requiring the immediate closure of the Tillamook County Landfill pursuant to 40 C.F.R. Parts 241 and 257, and §§ 264.50-.56, 264.110-.120, 265.50-.56, and 265.112-.118.

4.) Plaintiffs are entitled to injunctive relief restraining defendant Tillamook County or anyone from operating the Tillamook County Landfill until it has been brought in compliance with the Resource Conservation and Recovery Act and the above regulations.

5.) Under 42 U.S.C. § 6972, plaintiffs are entitled to recover the cost of this litigation, including reasonable attorney and expert witness fees.

6.) Plaintiffs are entitled to injunctive relief restraining defendant from operating the Tillamook County Landfill until it can be operated without unreasonable interference with plaintiffs' use and enjoyment of their residence and farmland.

7.) The discharge of leachate and the emission of dust and odors constitutes a nuisance and trespass of plaintiffs' real property by Tillamook County. Such nuisance and trespass is in violation of plaintiffs' right to exclusive possession.

8.) Plaintiffs are entitled to injunctive relief restraining defendant Tillamook County from operating the Tillamook County Landfill until it can be operated without trespass to plaintiffs' residence and farmland or the groundwater underneath.

9.) Defendant's conduct constitutes a taking of plaintiffs' land for public use without just compensation.

10.) Plaintiffs are entitled to recover $210,000.00, the damages they have sustained as a result of defendant's taking of their land, plus interest thereon at the legal rates from mid-1980, the date of taking.

11.) Plaintiffs are entitled to recover $210,000.00, the damages they sustained because of defendant's unreasonable interference with plaintiffs' use and enjoyment of their residence and farmland and because of defendant's trespass upon plaintiffs' residence and farmland.

12.) Under ORS 20.085, plaintiffs are entitled to recover reasonable attorney fees incurred in this case for inverse condemnation.

13.) Defendant Tillamook County is required to operate its landfill in accordance with the regulations promulgated under the Resource Conservation and Recovery Act, 32 U.S.C. §§ 6901-87.

14.) The doctrine of sovereign immunity does not apply to defendant.

15.) The doctrine of sovereign immunity does not protect defendant Tillamook County from suits to enjoin defendant from operating the Tillamook County Landfill as a nuisance or a trespass.

16.) The doctrine of sovereign immunity does not protect defendant from suits for inverse condemnation.

17.) Plaintiffs have commenced this action within the time allowed by law. The claims stated in plaintiffs' Complaint are continuing torts.

18.) Plaintiffs have given defendant adequate notice of their claims as required by the Resource Conservation and Recovery Act and as required by Oregon law.

19.) Plaintiffs have stated claims for violations of the Resource Conservation and Recovery Act, for nuisance, for trespass, and for inverse condemnation.

20.) The doctrine of *res judicata* does not bar plaintiffs from prosecuting any of the claims alleged in plaintiffs' complaint against defendant Tillamook County.

21.) The doctrine of discretionary/mandatory functions does not protect defendant from liability to plaintiffs for damages caused by defendant's wrongful and illegal operation of the Tillamook County Landfill.

22.) Defendant has never possessed plaintiffs' property adversely, *i.e.* hostily, exclusively, under color of title or claim of right.

23.) Except as admitted above, plaintiffs deny defendant's legal contentions.

DEFENDANT'S

1.) Tillamook County's operation of the sanitary landfill in compliance with the schedule established by DEQ is an absolute defense to the plaintiffs' claims for alleged violation of the federal standards and regulations established under RCRA.

2.) By the terms of RCRA, no federal standards or regulations were applicable to solid waste disposal activities conducted in the State of Oregon prior to June 22, 1982, and, therefore, no violation of those standards was possible prior to that date.

3.) State solid waste disposal standards and regulations promulgated by Oregon DEQ are irrelevant to the plaintiffs' federal claims prior to their acceptance by EPA on June 22, 1982.

4.) The decisions concerning the location, design, construction, and management and operation of the Tillamook County Sanitary Landfill are discretionary functions for which Tillamook County is immune from liability.

5.) Plaintiffs' claims for nuisance and trespass are barred by plaintiffs' failure to give adequate and timely notice of these claims to Tillamook County as required by the Oregon Tort Claims Act.

6.) Plaintiffs' claims for nuisance, trespass and inverse condemnation are barred by plaintiffs' failure to commence this action within the applicable statutes of limitations.

7.) The State of Oregon has never waived sovereign immunity for suits for injunctions. Plaintiffs' claims for

injunctive relief for nuisance, trespass and inverse condemnation are barred by the doctrine of sovereign immunity.

8.) Plaintiffs failed to give written notice of their claims for violation of the federal standards and regulations to either DEQ or EPA at least 60 days prior to commencing this action. This court therefore lacks subject matter jurisdiction of the plaintiffs' claims.

9.) Tillamook County's operation of the Landfill has not unreasonably interfered with the plaintiffs' use and enjoyment of their property.

10.) Tillamook County's operation of the landfill has not so substantially interfered with the plaintiffs' use and enjoyment of their property as to constitute inverse condemnation.

11.) Many of the plaintiffs' claims do not constitute violations of RCRA, nor do they constitute common law nuisance or trespass, nor inverse condemnation.

12.) The plaintiffs did or could have litigated the present claim to a final conclusion in their prior State Court proceeding against Tillamook County in 1979. The plaintiffs' claims are therefore barred as *res judicata*.

13.) The defendant is entitled to recover from the plaintiffs the cost of this litigation, including reasonable attorneys fees and expert witness fees.

14.) Except as admitted above, defendant denies plaintiffs' legal contentions.

7. *Amendments To Pleadings.*

Plaintiffs want to amend their Complaint by interlineation by inserting "17" in line 20 on page 5 of plaintiffs' Complaint, and to allege violations of OAR Chapter 340, Divisions 61, 62, and 63. Defendant does not object to the first proposed amendment, but does object to the second proposed amendment.

ESLER & SCHNEIDER

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BULLIVANT, WRIGHT, LEEDY, JOHNSON, PENDERGRASS & HOFFMAN

By /s/ Ronald E. Bailey
Ronald E. Bailey

By: /s/ James G. Driscoll
James G. Driscoll
Attorneys for Defendant

IT IS ORDERED the foregoing Pretrial Order is
___ Approved as lodged.
___ Approved as amended by interlineation.
DATED this ___ day of ___, 1983.

United States District Magistrate

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

OLAF A. and MARY E. HALLSTROM, husband and wife,	)	
Plaintiffs,	)	Civil No. 82-481JU
v.	)	OPINION AND ORDER
TILLAMOOK COUNTY, a municipal corporation,	)	
Defendant.	)	

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Of Attorneys for Defendant

JUBA, Magistrate:

I. *BACKGROUND*

This is a suit brought under the provisions of the Resources Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. § 6901 *et seq*. Plaintiffs own and reside on a commercial dairy farm located adjacent to a sanitary landfill owned and operated by defendant, Tillamook County. Plaintiffs maintain that the Tillamook County landfill is being operated in violation of the standards

and requirements established under RCRA. Plaintiffs have also made pendent state claims against defendant for common law nuisance, trespass and inverse condemnation.

Trial of this matter began on July 23, 1985 and was completed on July 26, 1985. The jury found for defendant and against plaintiff on all of the common law claims. The case is before me at present for a determination regarding the statutory claims. The parties presented evidence on this issue throughout the four day trial.

II. *FACTS*

Plaintiffs' property is located approximately two and one-half miles from the city of Tillamook. It is primarily agricultural in nature with portions classified as forest land and flood plain. At all times from 1951 to the present, the plaintiffs have resided on the land. From 1951 to 1979, plaintiffs operated a commercial dairy farm on their property. Since 1979 they have leased the dairy operation to Jack and Sharon Bennet, their neighbors. In 1983 the Bennett's purchased the dairy herd and approximately one acre of land including a house from plaintiffs. At the present time, the Bennetts lease only the grazing land.

Prior to 1949, Tillamook County established a County solid waste disposal site on an 80 acre parcel of forest land owned by the County. Prior to the fall of 1980, the land was used as an open dump. Subsequent to that date the site was converted to a sanitary landfill.

A brief description of the area is in order. The landfill lies on a slope and consequently, water moves down the

hill in the direction of the Hallstrom property. Ekloff Road runs between the County property and that belonging to the Hallstroms. Water flows down from the County's property and under Ekloff Road through what is called the Hallstrom culvert and into the Hallstrom ditch which carries the water to Beaver Creek. Beaver Creek runs through the Hallstrom land in a generally east to west direction. The land between Beaver Creek and Ekloff Road is flood plain and thus is subject to flooding every winter.

Plaintiffs contend that the discharge of leachate (contaminated liquid) from the landfill has caused or contributed to bacterial and chemical pollution of the surface and ground water found on their land. They assert that this constitutes violations of RCRA and seek to enjoin the operation of the landfill.

III. *DISCUSSION*

Section 6972 of RCRA provides the jurisdictional basis for citizen suits. This provision authorizes private citizens to sue to enjoin solid waste practices that constitute "open dumping." RCRA prohibits "open dumping" except when a compliance schedule has been established in a state plan, and the facility is operated in conformity with the compliance schedule. 42 U.S.C. § 6945.

The criteria for determining what facilities and practices constitute open dumping are set forth in regulations enacted by the Environmental Protection Agency. 40 C.F.R. § 257. The regulations set out eight criteria, the violation of which constitutes open dumping. Plaintiffs focus on the criteria relating to surface and ground water.

A. *Surface Water*

Section 257.3-3(c) provides that:

> "(c) A facility or practice shall not cause non-point source pollution of waters of the United States that violates applicable legal requirements implementing an areawide or Statewide water quality management plan that has been approved by the Administrator under Section 208 of the Clean Water Act, as amended."

Non-point source pollution "refers to diffuse or unconfined sources of pollution where wastes can either enter into – or be conveyed by the movement of water to – public waters." OAR 340-31-006(17). The parties agree that the landfill is a non-point source.

Thus, we next turn to Oregon's State-Wide Water Quality Management Plan found at OAR Chapter 340, Division 41. OAR 340-41-205 sets forth specific water quality standards applicable to Tillamook County. The standards for bacterial pollution are set forth in OAR 340-41-205(2)(e) and (f):

> "(2) No wastes shall be discharged and no activities shall be conducted which either alone or in combination with other wastes or activities will cause violation of the following standards in the waters of the North Coast – Lower Columbia River Basin:
>
> . . . .
>
> "(e) Organisms of the coliform group where associated with fecal sources (MPN or equivalent MF using a representative number of samples):
>
> . . . .
>
> "(C) Estuarine waters other than shellfish growing waters: A log mean of 200 fecal coliform per 100 ml.

based on a minimum of 5 samples in a 30-day period with no more than 10% of the samples in the 30-day period exceeding 400 per 100 ml.

. . . .

"(f) Bacterial pollution or other conditions deleterious to waters used for domestic purposes, livestock watering, irrigation, bathing, or shellfish propagation or otherwise injurious to public health shall not be allowed."

1. *Fecal Coliform*

A large portion of both parties' proof concentrated on the presence or absence of fecal coliform on plaintiffs' land. Plaintiffs contend that the water leaving the dump and entering their land contains large amounts of fecal coliform in violation of OAR 340-41-205(2)(e)(C). The evidence presented by plaintiff indicated that in the fall of 1984, that was indeed the case. On the other hand, defendant put on equally persuasive evidence that from January 17, 1985 through June 24, 1985 the bacterial concentrations at the Hallstrom culvert did not exceed the statutory limit. Plaintiffs argue that their data is more accurate in that it was obtained during a time of normal rainfall whereas the winter and spring of 1985 were unusually dry. Defendant argues that its data is more representative of the conditions present in that it was taken over a longer period of time, ie., six months rather than three.

This apparent contradiction in the evidence would present a significant problem for the fact finder, however, I find that plaintiffs have failed in their burden of proof as dictated by the Oregon regulations. OAR

340-41-205(2)(e)(C) requires that evidence of bacterial contamination be presented in terms of logarithmic means. The only evidence at trial concerning log means was the testimony of Terry Rahe, on behalf of defendants. He testified that the use of log means presents a more realistic picture of the bacterial distribution. Mr. Rahe is a microbiologist and a consulting soil engineer. He testified that the samples taken between January and June of 1985 from the Hallstrom ditch showed a log mean of 61 fecal coliform per 100 millileters.

Plaintiffs, in their post-trial brief, reanalyzed their data, indicating the log means. However, I have reviewed the exhibits and evidence from trial and determined that plaintiffs failed to present their data in the manner required by the administrative rules. For that reason, I cannot find a violation of OAR 34-41-205(2)(e).

2. *Other Bacteria – Salmonella*

Subsection (2)(f) of OAR 340-41-205(2) makes "bacterial pollution . . . deleterious to waters used for- . . . livestock watering . . . or otherwise injurious to public health" a violation. Plaintiff contends that surface water leaving the garbage dump contains Salmonella and Shigella bacteria in numbers that present a public health hazard.

Exhibit 218, presented by Paul Stevens, president of the Water, Food and Research Lab, Inc., is the summary of data resulting from three sampling trips made on October 18, 25 and November 1 of 1984. The results show the presence of Salmonella and Shigella in Middle Beaver

Creek and the Hallstrom culvert. The presence of Salmonella and Shigella was confirmed biochemically and serologically. Plaintiffs argue that because none of these bacteria were found in Upper Beaver and large numbers were found in the Hallstrom culvert and Middle Beaver Creek, the source of the bacteria is the garbage dump located directly above and draining into the culvert.

According to the testimony of Jay Vasconcelos, a regional microbiologist for EPA who specializes in medical microbiology, Salmonella is considered to be an "indicator organism" which indicates the presence of pathogenic bacteria. Salmonella can cause disease in humans and animals, including typhoid fever. During cross examination, Mr. Vasconcelos testified that the concentrations of Salmonella found in the fall of 1984 constitute a "definite health hazard." In his opinion the problem is a surface one, not involving the ground water.

Further testing for Salmonella was done in June of 1985. None were found at that time by experts for either party. Plaintiffs once again argue that the absence of appreciable rainfall distorted the figures arising from the June sampling. Mr. Vasconcelos explained that rain influences the composition of surface water. Since bacteria is moved by water, higher concentrations of bacteria would be expected at times of greater rainfall.

OAR 340-41-205(2)(f) requires that plaintiff bring forward proof tending to establish by a preponderance of the evidence that there is in fact bacterial pollution either deleterious to waters used for livestock watering or injurious to public health. There is evidence of harmful concentrations of Salmonella in the fall of 1984. However,

there is no evidence of the presence of Salmonella from June of 1985 through the time of trial. Further, as defendant points out, there is no evidence that the waters of Beaver Creek are used for domestic purposes, irrigation, bathing or shellfish propagation. The creek *is* used for livestock watering. Norm Bennett, one of the leasees of the property testified that the Bennett cattle routinely drink from Beaver Creek without suffering any ill effects.

The land between Ekloff Road and Beaver Creek is used to pasture heifers in all seasons but winter. During the winter months the pasture area is flooded. The only practical use of the area is as pasture land. Plaintiffs did not present any evidence of particular health hazards associated with the presence of Salmonella on plaintiffs' land. There was no actual proof of harmful effects from the landfill operation on the only beneficial use of the land.

There is some question in my mind whether OAR 340-41-205(2)(f) requires only proof of potential public health hazards or if there must be proof of actual injury to public health. There is certainly proof in this case that a potential hazard existed in the fall of 1984, however, as I said above, the only possible beneficial use of the land adjacent to and flooded by Beaver Creek is as pasture land. I need not resolve that question, however, as I find that plaintiff has proven other violations of the Oregon State-Wide Quality Management Plan having to do with surface water which mandate the remedy I will set out below.

3. *Other Water Quality Standards*

OAR 340-41-205(2)(j), (k) and (l) prohibit:

> "(j) The formation of appreciable bottom or sludge deposits or the formation of any organic or inorganic deposits deleterious to fish or other aquatic life or injurious to public health, recreation, or industry shall not be allowed.
>
> "(k) objectionable discoloration, scum, oily sleek, or floating solids, or coating of aquatic life with oil film shall not be allowed.
>
> "(l) Aesthetic conditions offensive to the human senses of sight, taste, smell, or touch shall not be allowed."

Ample proof was presented at trial to persuade me, by a preponderance of the evidence that leachate escapes from the confines of the landfill onto plaintiffs' land. The testimony at trial indicated that the leachate is generally dark yellow or brown in color with an offensive odor. There was evidence of "ponding" and overflows of leachate at the pumphouse and sump. The escaping leachate mixes with rain run-off and runs down the hill in channels through the Hallstrom culvert, into the Hallstrom ditch and on into Beaver Creek. Mr. Hallstrom testified that although there was no leachate spilling at the time of trial, there was no improvement in the amount of leachate on his land over the winter months. As this summer has admittedly been drier than usual, the amount of leachate produced would be expected to be less.

There was testimony from several witnesses that the leachate has had an adverse effect on the waters of Beaver Creek and the Hallstrom ditch. Norm Bennett testified that he could see that the leachate had contaminated

the stream. He has noticed leachate flowing into the creek making it look "ugly." He has also noted that it sticks to the bottom, creating a build-up of sludge. On several of his sampling trips, Mr. Stevens observed a reddish cast to the water in the Hallstrom ditch and a build-up of "gunk on the bottom." Mr. Hallstrom testified that water mixed with foul-smelling leachate drains onto his land and into the Hallstrom ditch and Beaver Creek. The leachate creates an oily film on the water and causes the build-up of sludge on the bottom of the ditch.

All of his convinces me that there has been and will continue to be violations of OAR 340-41-205(2)(j), (k) and (l). Furthermore, although plaintiffs did not provide ample proof of violations regarding fecal coliform and there is question about further bacterial violations in the form of Salmonella, these problems are undoubtedly contributed to by the escape of leachate from the confines of the landfill. For those reasons, I conclude that some remedy is necessary to rectify the situation. Since that is my conclusion, I need not go further and address plaintiffs' other allegations of violation of RCRA. As noted above, RCRA incorporates the standards of water quality set out in Oregon's State-Wide Water Quality Management Plan. Therefore, a violation of OAR 340-41-205(2) is also a violation of RCRA.

IV. *REMEDY AND CONCLUSION*

Plaintiffs seek injunctive relief and ask that I order the landfill closed. I do not feel that in this instance that would be an appropriate remedy. It is within my discretion to refuse to issue an order of immediate cessation.

The better interpretation of RCRA is that it permits the court to order the relief it considers necessary to secure prompt compliance with the Act. *See Weinberger v. Romero-Barcelo,* 456 U.S. 305, 320 (1982) (interpreting the citizen suit provisions of the Federal Water Pollution Control Act, which are nearly identical to those of RRA).

I do not believe closure of the dump is necessary to obtain compliance with RCRA. It is my intention to obtain complete and permanent containment of the leachate generated by the landfill. To achieve that goal, defendant is ordered to submit a proposal outlining the steps necessary to achieve permanent and complete containment of the leachate within the boundaries of the landfill site within sixty (60) days of entry of this order.

Subsequent to the entry of an Order consistent with the above, claims for attorney fees will be addressed in supplementary submissions by the parties.

The foregoing constitutes my Findings of Fact and Conclusions of Law pursuant to Rule 52(a) Fed. Civ. P.

Dated this 30 day of September, 1985.

/s/ George E. Juba
United States Magistrate

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

OLAF A. and MARY E. HALLSTROM, husband and wife, Plaintiffs, vs. TILLAMOOK COUNTY, a municipal corporation, Defendant.	Civil No. 82-481-JU FINAL JUDGMENT AND DECREE (Filed June 23, 1986)

This case was tried commencing July 23, 1985, The Honorable George E. Juba presiding. Plaintiffs' claims for common law nuisance and trespass and for inverse condemnation under the Oregon Constitution were tried to a jury. Plaintiffs' claims for violation of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 USC § 6901, *et seq.*, were tried to the Court.

On July 29, 1985 the jury returned its verdict for the defendant and against the plaintiffs on all of plaintiffs' state law claims for damages for compensation.

On September 30, 1985, the Court entered its *OPINION AND ORDER*, finding that defendant had violated Section 257.3-3(c) of RCRA.

On June 23, 1986, the Court entered its *ORDER AND DECREE*, requiring defendant to take steps as set forth therein to prevent future escapes of leachate from the landfill boundary.

Accordingly, it is hereby ADJUDGED AND DECREED that:

(1) Defendant comply with the terms of the ORDER AND DECREE of June 23, 1986; and that

(2) Defendant have judgment in its favor on plaintiffs' claims for trespass, nuisance and inverse condemnation.

DATED this 23 day of June, 1986.

/s/ George E. Juba
George E. Juba
UNITED STATES MAGISTRATE

Presented By:

/s/ James G. Driscoll
James G. Driscoll

Of Attorneys for Defendant

Olaf A. HALLSTROM and Mary E. Hallstrom, husband and wife, Plaintiff-Appellants, and Cross-Appellees,

v.

TILLAMOOK COUNTY, a municipal corporation, Defendant-Appellee, and Cross-Appellant.
Nos. 86-4016, 86-4100 and 86-4257.

United States Court of Appeals,
Ninth Circuit

Argued and Submitted Sept. 10, 1987.
Decided Nov. 3, 1987.

As Amended on Denial of Rehearing and Rehearing En Banc April 7, 1988.

Appeal from the United States District Court for the District of Oregon.

Before WRIGHT, WALLACE and PREGERSON, Circuit Judges.

ORDER

The panel voted unanimously to deny the petition for rehearing. The majority of the panel voted to reject the suggestion for rehearing en banc. Judge Pregerson was in favor of granting the suggestion for rehearing en banc.

A call for an en banc vote was made and the case failed to receive a majority of the votes of the active circuit judges in favor of rehearing en banc.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

AMENDED OPINION

EUGENE A WRIGHT, Circuit Judge:

This case requires us to determine whether failure to comply with the 60 day notice requirement of the Resource Conservation and Recovery Act of 1976 (RCRA) deprived the district court of subject matter jurisdiction to hear this case. Of the seven circuits that have considered this issue, three have found that notice is a jurisdictional prerequisite and four have held that notice is merely procedural.

We hold that proper notice is a precondition of the district court's jurisdiction. Because the Hallstroms failed to notify the Environmental Protection Agency (EPA) and the Oregon Department of Environmental Quality (DEQ) before filing suit, the district court lacked subject matter jurisdiction to hear the case. We remand for dismissal.

BACKGROUND

The Hallstroms own property near the Tillamook County landfill. They allege that leachate (contaminated liquid) discharged from the landfill caused or contributed to bacterial and chemical pollution of their surface and ground water. In April 1982, they filed suit against the county under 42 U.S.C. § 6972, claiming that the county was violating RCRA, 42 U.S.C. § 6901, *et seq*. Nine months later they notified in writing the EPA and the DEQ of the suit. They also made pendent state law claims for common law nuisance, trespass, and inverse condemnation.

The district court found that leachate from the landfill was polluting the Hallstroms' land in violation of RCRA and the Oregon State-Wide Water Quality Management Plan, which is incorporated by RCRA. The court ordered the county to contain the leachate within two years. The state claims were heard by a jury, which found for the county on all three claims.

DISCUSSION

> 42 U.S.C. § 6972(b)(1) provides:
> No action may be commenced under . . . this section . . . prior to sixty days after the plaintiff has given notice of the violation to—(i) the Administrator [of the EPA]; (ii) the State in which the alleged violation occurs; and (iii) any alleged violator of [any] permit, standard, regulation, condition, requirement, prohibition, or order [pursuant to RCRA] . . .

At least eight environmental statutes contain identical or similar notice provisions. *Susquehanna Valley Alliance v. Three Mile Island*, 619 F.2d 231, 242 n. 12 (3d Cir.1980), *cert. denied*, 449 U.S. 1096, 101 S.Ct. 893, 66 L.Ed.2d 824 (1981). Courts have construed these provisions identically despite slight differences in wording. *See, e.g., Garcia v. Cecos Int'l, Inc.*, 761 F.2d 76, 79 (1st Cir.1985); *Natural Resources Defense Council v. Train*, 510 F.2d 692, 699-700 (D.C.Cir.1974).

This notice requirement is designed to balance the value of citizen enforcement of federal environmental policies against the burdens that such enforcement places on the EPA and the federal courts. By notifying the EPA and the state of potential legal action, the citizen plaintiff

allows them to avoid litigation by investigating and correcting the alleged violation through non-judicial means. *Garcia*, 761 F.2d at 81; *National Resources Defense Council*, 510 F.2d at 700.

This court considers for the first time the significance of the § 6972(b)(1) requirement. Two conflicting interpretations divide the circuits that have considered this section.

The "pragmatic approach," adopted by the Second, Third, Eighth, and District of Columbia Circuits, treats the notice requirement in the federal environmental statutes as procedural. *See, e.g., Natural Resources Defense Council v. Callaway*, F.2d 79, 83-84 (2d Cir.1975); *Susquehanna Valley Alliance*, 619 F.2d at 243; *Hempstead County and Nevada County Project v. U.S.E.P.A.*, 700 F.2d 459, 463 (8th Cir.1983); *Natural Resources Defense Council v. Train*, 510 F.2d 692 (D.C.Cir.1974). Failure to satisfy its terms may be cured by the court staying proceedings for 60 days so that the purpose of the notice requirement may be met. Under this approach, so long as 60 days elapse before the district court takes action, formal compliance with the terms of the requirement is not required.

This approach focuses on the role and right of the citizen in enforcing federal environmental policies. *See, e.g., Natural Resources Defense Council*, 510 F.2d at 700 ("[c]itizens can be a useful instrument for detecting violations and bringing them to the attention of the enforcement agencies and courts alike.") Adherents of this view believe that strict application and enforcement of the

notice requirement is contrary to Congress' intent in permitting citizen actions. Such a construction would frustrate citizen enforcement of the act, *Pymatuning Water Shed Citizens, etc. v. Eaton*, 644 F.2d 995, 996 (3d Cir.1981), and treat citizens as "troublemakers" rather than "welcome participants in the vindication of environmental interests." *Proffitt v. Commissioners, Township of Bristol*, 754 F.2d 504 (3d Cir.1985)

We adopt Judge Wisdom's better reasoned "jurisdictional prerequisite approach," set forth in *Garcia*, 761 F.2d at 78. *See also Walls v. Waste Resource Corp.*, 761 F.2d 311, 316 (6th Cir.1985); *City of Highland Park v. Train*, 519 F.2d 681 (7th Cir.1975), *cert. denied*, 424 U.S. 927, 96 S.Ct. 1141, 47 L.Ed.2d 337 (1976). This approach focuses on the plain language of the statute and the policy concerns underlying the notice requirement.

Judge Wisdom wrote, "The plain language of § 6972(b) commands sixty days' notice before commencement of the suit. To accept anything less 'constitutes, in effect, judicial amendment in abrogation of explicity, unconditional statutory language.'" *Garcia*, 761 F.2d at 78. "The notice requirement is not a technical wrinkle or superfluous formality that federal courts may waive at will. . . . [I]t is part of the jurisdictional conferral from Congress that cannot be altered by the courts." *Id.* at 79.

Strict application of the notice requirement is supported by an exception within § 6972 which waives the 60 day notice requirement if the alleged violation involves hazardous waste. 42 U.S.C. § 6972. This provision makes

clear that Congress considered the 60-day notice requirement and intended that it apply in all cases, except those involving hazardous waste.

We also agree with the First Circuit that the jurisdictional interpretation of § 6972(b) serves better the underlying policy aims of encouraging non-judicial resolution of environmental conflicts. As it noted, once a suit is filed, positions become hardened, parties incur legal fees, and relations become adversarial so that cooperation and compromise is less likely. *Garcia*, 761 F.2d at 82. The pragmatic approach fails to recognize that "a mere adjustment of the trial date or the filing of a supplemental or amended complaint to cure defective notice cannot restore a sixty day non-adversarial period to the parties." *Id.*

Section 6972(b) and its legislative history reflect Congress's belief that the citizen-plaintiff working with the state or the EPA can better resolve environmental disputes than can the courts. Congress believed that citizen enforcement through the courts should be secondary to administrative enforcement by the EPA. The notice requirement of § 6972(b) was intended to "trigger administrative action to get the relief that [the citizen] might otherwise seek in the courts." 116 Cong.Rec. 32,927 (1970).

Anything other than a literal interpretation of the 60-day notice requirement of the federal environmental statutes would effectively render those provisions worthless. For instance, if a citizen-plaintiff could file a suit under RCRA without following the notice requirements and avoid a motion to dismiss simply by arguing that the EPA

or other relevant authority had more than 60 days to act prior to the commencement of trial or discovery proceedings, then, under the realities of modern-day litigation, no one would ever comply with this requirement. We will not attribute to Congress an intent to enact a provision after hours of debate that could be evaded by every potential plaintiff, thus rendering it meaningless.

Non-judicial resolution of such conflicts is more likely if parties consider their interests and positions in a nonadversarial setting before suit if filed. Litigation should be a last resort only after other efforts have failed. *See* comments of Senators Muskie and Hart, 116 Cong.Rec. at 33,103-33,104 (1970). We believe that the "jurisdictional prerequisite" approach is more consistent with this design than the pragmatic approach.

The Hallstroms' failure to notify the EPA and DEQ 60 days before filing suit against the county barred the district court's subject matter jurisdiction over the RCRA claim. Because the court lacked federal jurisdiction at the time the suit was filed, it lacked pendent jurisdiction also. The federal court's power to exercise pendent jurisdiction derives from its federal jurisdiction. *See United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966); *Hunter v. United Van Lines*, 746 F.2d 635, 649 (9th Cir. 1984), *cert. denied*, 474 U.S. 863, 106 S.Ct. 180, 88 L. Ed.2d 150 (1985).

Without federal jurisdiction, a federal court has no power to hear state claims. *Hunter*, 746 F.2d at 649: "the federal court acquires its power over the [pendent] claim . . . only if the court has previously properly been seized of jurisdiction. The federal court's jurisdiction over the

state-law claim is entirely derivative of its jurisdiction over the federal claim." (citations omitted).

Because the jurisdiction issue is dispositive, we do not reach the other issues. The case is remanded to dismiss and vacate the court's opinion. We reverse the award of fees to the county.

PREGERSON, Circuit Judge, dissenting:

The majority holds that the 60-day notice requirement of 42 U.S.C. § 6972(b) is jurisdictional. It therefore holds that the district court lacked jurisdiction over this action, even though the EPA and the Oregon Department of Environmental Quality received written notice of the action more than *two years* before trial began. By requiring dismissal, the majority exalts form over substance. I therefore dissent.

The Hallstroms filed their complaint on April 9, 1982. They gave written notice to the EPA and the Oregon Department of Environmental Quality (DEQ) on March 2, 1983. The EPA had actual notice in December 1982; the DEQ in January 1983. The trial began on July 22, 1985.

Section 6972 of the Resource Conservation Recovery Act (RCRA), 42 U.S.C. § 6972 allows for citizen enforcement of certain statutory provisions. Section 6972(b)(1) provides that "[n]o action may be commenced . . . under this section . . . prior to 60 days after the plaintiff has given notice of the violation to—(i) the Administrator; (ii) the state in which the alleged violation occurs; and (iii) to any alleged violator . . . " We must decide whether this requirement acts to deprive a district court of jurisdiction

over an action *filed* in the court before 60 days have elapsed.

The majority of the circuits that have addressed this issue have held the the 60-day notice requirement is procedural, not jurisdictional. *See, e.g., Hempstead County & Nevada County Project v. EPA*, 700 F.2d 459, 463 (8th Cir. 1983); *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231 243 (3d Cir.1980) (construing an identical provision of the Federal Water Pollution Control Act), *cert. denied*, 449 U.S. 1096, 101 S.Ct. 893, 66 L.Ed.2d 824 (1981); *Natural Resources Defense Council v. Callaway*, 524 F.2d 79, 83-84 (2d Cir.1975) (construing the Federal Water Pollution Control Act): *Natural Resources Defense Council v. Train*, 510 F.2d 692, 699-700 (D.C. Cir.1974) (construing amendments to the Clean Air Act). I agree.

One of the purposes of the 60-day notice requirement is to allow the EPA to enforce the statute. The majority, while recognizing this purpose, contends that "the jurisdictional interpretation of §§ 6972(b) serves better the underlying policy aims of encouraging non-judicial resolution of environmental conflicts." At 601. This case illustrates the weakness of that view. At oral argument, counsel for the Hallstroms stated that the EPA was well aware of the conflict between the Hallstroms and Tillamook County. In fact, EPA personnel had called him at various stages of the district court action to ask how it was proceeding. At no time did the EPA indicate any interest in enforcing the statute; it was content to let the Hallstroms proceed with their citizens' suit.

I would interpret the statute to require that 60 days elapse before the district court may act. This approach furthers the goal of agency enforcement; it allows the agency to consider the alleged violation for 60 days. If the agency has taken no action after 60 days, the district court may proceed. It would be "excessively formalistic" to require the district court to dismiss the action and the parties to refile. *Susquehanna Valley Alliance,* 619 F.2d at 243.
